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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1955

No. 701

**CURTIS REID, SUPERINTENDENT OF THE DISTRICT
OF COLUMBIA JAIL, APPELLANT,**

vs.

CLARICE B. COVERT

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA**

FILED FEBRUARY 17, 1956

JURISDICTION POSTPONED MARCH 12, 1956

SUPREME COURT OF THE UNITED STATES

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1. [File endorsement omitted]

In the United States District Court for the District of Columbia

UNITED STATES OF AMERICA ON THE RELATION OF CLARICE B. COVERT

v.

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL

Habeas Corpus No. 87-55

PETITION FOR WRIT OF HABEAS CORPUS—Filed November 17, 1955

The petition of the relator Clarice B. Covert, above-named, respectfully alleges and shows to the Court as follows:

1. Relator is a citizen of the United States and a resident of the State of Georgia, and is now in custody of the said respondent Curtis Reid, the Superintendent of the District of Columbia Jail, within the territorial limits of the District of Columbia, and is by him unlawfully imprisoned and restrained of her liberty by color of the authority of the United States Air Force, and such custody, imprisonment and restraint is in violation of relator's rights under the Constitution of the United States, all as more particularly hereinafter recited.

2. In March 1953, relator was living in Upper Heyford, Oxfordshire, England, with her two children and her husband, Edward E. Covert. The said Edward E. Covert was then a Master Sergeant in the United States Air Force, assigned to the 3918th Installations Squadron of the 3918th Air Base Group, and relator and their two children had been furnished Government transportation to England as his dependents, and were living with him in England in quarters furnished by the Government.

2 3. On March 10, 1953, relator was under psychiatric treatment by a medical officer of the United States Air Force. On the night of March 10/11, 1953, while legally irresponsible and suffering from a psychotic disturbance variously diagnosed as psychotic depressive reaction and as paranoid schizophrenia, relator killed her husband, the said Edward E. Covert, after which she climbed into bed with his corpse and stayed there all night.

4. Thereafter, purporting to act under the authority of Article 2(11) of the Uniform Code of Military Justice (50 U. S. C. § 552(11)), the Commander of the 7th Air Division, United States Air Force, caused relator to be tried by a general court-martial of the United States Air Force convened at RAF Station Brize Norton,

Oxfordshire, England, on a charge of premeditated murder in violation of Article 118(1) of the Uniform Code of Military Justice (50 U. S. C. § 712(1)).

5. Relator was so tried on May 25 to 29, 1953, and on May 29, 1953, was convicted of premeditated murder and sentenced to life imprisonment.

6. On June 23, 1953, relator was flown, in the custody of the United States Air Force, to the Federal Reformatory for Women situated at Alderson, West Virginia, and was there confined as a prisoner by virtue of said conviction, beginning June 25, 1953. On December 7, 1953, while still a prisoner at Alderson, a third child was born to relator.

7. Thereafter, on June 24, 1955, in a decision reported at 6 USCMA 48 and 19 CMR 174, the United States Court of Military Appeals reversed relator's conviction, and remanded her case for rehearing, i. e., a new trial, or other action not inconsistent with its opinion.

8. On July 14, 1955, relator was released from the Federal Reformatory for Women at Alderson, West Virginia, and was taken, in the custody of the United States Air Force, to the District of Columbia Jail, and there restrained by the respondent Reid.

9. On July 20, 1955, the then Secretary of the Air Force, Harold E. Talbott, personally determined that relator should again be tried by court-martial.

10. On July 25, 1955, relator was taken to St. Elizabeths Hospital for psychiatric evaluation, and was there held as a prisoner. She was found to be sane and not a menace to society, and on September 23, 1955, was returned to the District of Columbia Jail, within the territorial limits of the District of Columbia, where she still remains, under restraint imposed by the respondent Reid by color of the authority of the United States Air Force.

11. The charge against relator referred to in paragraph 4 above has been again referred for trial to a general court-martial of the United States Air Force appointed by the Commander, Headquarters Command, United States Air Force, who however directed that the case be treated as not capital. Said trial has been tentatively scheduled to take place at Bolling Air Force Base in the District of Columbia commencing on November 28, 1955.

12. The said custody, imprisonment and restraint of relator, and her impending trial by court-martial within the geographical limits of the United States are severally illegal and in violation of Article IV, Section 2 of, and the Sixth Amendment to, the Constitution of the United States, as follows:

a. If it be assumed that Article 2 (11), Uniform Code of Military Justice (50 U. S. C. § 552(11)), *supra*, ever validly conferred juris-

4 diction on the United States Air Force to try relator as a person "accompanying the armed force without the continental limits of the United States," then such jurisdiction terminated after relator's conviction was set aside, and she was held within the continental limits of the United States, not in the custody of the armed forces, but in three separate civilian institutions, viz., the Federal Reformatory for Women, the District of Columbia Jail, and St. Elizabeth's Hospital, which are, respectively, under the supervision, jurisdiction, and control of the United States Department of Justice, the Government of the District of Columbia, and the United States Department of Health, Education and Welfare.

b. In view of the recent ruling of the Supreme Court of the United States in *United States ex rel. Toth v. Quarles*, 350 U. S. 11, decided November 7, 1955, there is no valid basis for contending that any military jurisdiction that once existed can now be reasserted.

c. More fundamentally, however, Article 2(11), Uniform Code of Military Justice (50 U. S. C. § 552(11)), which purports to subject to military jurisdiction in time of peace the dependent wife of an airman who has herself no functional relationship with or to the armed forces, is unconstitutional because it violates both Article III, Section 2 of, and the Sixth Amendment to, the Constitution of the United States, which severally guarantee to relator, a civilian, the right of a trial by jury, and because the power conferred on Congress by Section 8 of Article I of the Constitution to "make Rules for the Government and Regulation of the land and naval forces" does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace.

5 13. Granting the writ now prayed for will not mean that relator will go unpunished. She has now been confined for over two and a half years, since March 11, 1953, during all of which time she has been separated from her two older children; and she has been separated from her youngest child, born December 7, 1953, since March 8, 1954, when he was taken from her. Relator further avers, on information and belief, that the associates of Toth, who now completely escapes punishment, served much shorter sentences than this relator. Second Lieutenant Schreiber, who gave the order to kill the Korean there involved, and whose case is reported at 5°USCMA 602 and 18 CMR 226, was released after twenty months' confinement; while Airman First Class Kinder, who pulled the trigger, and whose case is reported at 14 CMR 742, was released after serving only fifteen months and moreover received an honorable discharge. Further, as the cited decisions

show, neither Schreiber nor Kinder were at the time of their offense suffering from mental derangement, disease, or defect of any kind.

WHEREFORE your relator prays that a writ of habeas corpus be granted and issued, directed to Curtis Reid, Superintendent of the District of Columbia Jail, commanding him to produce the body of the relator before this Court at a time and place therein to be specified, then and there to receive and do what this Court shall order concerning the detention and restraint of relator, and that relator be ordered discharged from the detention and imprisonment aforesaid.

CLARICE B. COVERT,
Relator.

FREDERICK BERNAYS WIENER,
Suite 815 Stoneleigh Court,
1025 Connecticut Avenue, N.W.,
Washington 6, D. C.,
(District 7-2163),

Attorney for the Relator.

6 *Duly sworn to by Clarice B. Covert. Jurat omitted in printing.*

7 [File endorsement omitted]

In the United States District Court for the District of Columbia
Habeas Corpus No. 87-55

UNITED STATES OF AMERICA ON THE RELATION OF CLARICE B. COVERT

v.

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL

Habeas Corpus No. 87-55

ORDER DIRECTING RESPONDENT TO SHOW CAUSE—November 17, 1955

Upon consideration of the verified petition of CLARICE B. COVERT for a writ of habeas corpus filed herein, and good cause appearing therefor, it is, this 17th day of November, 1955,

ORDERED, That the respondent be and he is hereby ordered and directed to appear before the Judge of said Court sitting in Motions Court on the 22nd day of November, at 10 o'clock A. M. of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued and the relief granted as prayed for in

the aforesaid petition; *provided*, that a copy of this rule and of said petition be promptly served upon the respondent herein.

EDWARD A. TAMM,
United States District Judge

8

[File endorsement omitted]

United States District Court for the District of Columbia

[Title omitted]

RETURN AND ANSWER—Filed November 22, 1955

Now comes the respondent, Curtis Reid, Superintendent of the District of Columbia jail, upon whom has been served an order to show cause why a writ of habeas corpus should not issue for the production of Clarice B. Covert and by his attorney, Leo A. Rover, United States Attorney in and for the District of Columbia, makes the following return to the said order and respectively shows that he holds the said Clarice B. Covert by authority of the United States as a person subject to military jurisdiction and amenable to trial by court-martial under the following circumstances:

I

That on March 31, 1953, an officer of the United States Air Force signed court-martial charges under oath charging the said Clarice B. Covert with the premeditated murder of Master Sergeant Edward E. Covert, on or about March 10, 1953, in violation of Article 118 of the Uniform Code of Military Justice (50 U.S.C. 712). That on or about March 31, 1953, the said Clarice B. Covert was residing on Royal Air Force Station, Upper Heyford, Oxfordshire, England, as a person accompanying the armed forces of the United States without the continental limits of the United States and the territories thereof.

9

II

That the charge against Clarice B. Covert was tried by general court-martial on May 25-29, 1953. That Clarice B. Covert was duly found guilty of the charge and of the specification of the charge and was sentenced to be confined at hard labor for life. That the record of trial was duly reviewed by the Staff Judge Advocate of Headquarters, Seventh Air Division, APO 125, in accordance with Article 61 of the Uniform Code of Military Justice (50 U.S.C. 648). That the officer exercising general court-martial jurisdiction over Clarice B. Covert approved the sentence adjudged and promulgated a court-martial order showing such approval

under paragraph 90, Manual for Courts-Martial, United States, 1951 (16 F.R. 1348). An authenticated copy of General Court-Martial Order No. 14, Headquarters, Seventh Air Division, APO 125, c/o Postmaster, New York, New York, dated June 22, 1953, is appended hereto (Exhibit A).

III

That the record of trial in the case of Clarice B. Covert was forwarded to The Judge Advocate General of the United States Air Force in accordance with Article 65 of the Uniform Code of Military Justice (50 U.S.C. 652) for review by a Board of Review. That qualified military counsel were appointed to represent Clarice B. Covert in all appellate matters involved in her case in accordance with Article 70 of the Uniform Code of Military Justice (50

10 U.S.C. 657). That Clarice B. Covert also retained civilian counsel to represent her in appellate matters involved in her case. That on September 28, 1953, the civilian counsel retained by Clarice B. Covert filed an assignment of errors before the Board of Review, one of which assigned errors was an allegation that the court-martial improperly found Clarice B. Covert sane as, according to the civilian counsel, the record of trial clearly indicated that Clarice B. Covert was insane and not legally responsible when the act was committed. An authenticated copy of the Assignment of Errors which was filed on behalf of Clarice B. Covert is appended hereto (Exhibit B).

IV

The Board of Review in the Office of The Judge Advocate General, United States Air Force, considered all the errors assigned by military and civilian counsel on behalf of Clarice B. Covert and decided that no error was committed in the conduct of her trial which materially prejudiced her rights, and that the findings of guilty and the sentence were correct in law and in fact. That the Board specifically found competent evidence in the record of trial indicating that prior to the entry of Clarice B. Covert into the area (England) it was necessary to first obtain permission for such entry from the Commanding General, Third Air Force; that pertinent regulations of the Third Air Force prescribed the procedure covering application for permission for dependents of service personnel to enter the United Kingdom and for travel thereto; that Clarice B. Covert's husband, Master Sergeant Edward E.

11 Covert, pursuant to applicable regulations filed application for transportation of Clarice B. Covert and his dependent children to England; that said application was duly processed in accordance with pertinent regulations and in accordance therewith Clarice B. Covert and her minor children were, as de-

pendents of Master Sergeant Edward E. Covert, the deceased, included upon a priority list for shipment from the United States to the United Kingdom; that pursuant thereto appropriate orders were issued by Headquarters, Third Army, Fort McPherson, Georgia, authorizing Clarice B. Covert's travel, together with her minor children, from the United States to England at Government expense; and that in accordance with the above authorization Clarice B. Covert travelled to England via military service transport; that Government facilities at the point of embarkation and disembarkation were utilized and that Clarice B. Covert travelled in company with other civilian dependents of other military personnel assigned to duty in England; that upon arrival at Royal Air Force Station, Upper Heyford, England, Master Sergeant Edward E. Covert, the husband of Clarice B. Covert, was assigned public quarters and Clarice B. Covert was issued appropriate authorization for Commissary and Post Exchange facilities; and that on at least three occasions subsequent to 15 February 1953, Clarice B. Covert received medical treatment at United States Air Force medical facilities at Upper Heyford, England. An authenticated copy of the decision of the Board of Review is appended hereto (Exhibit C).

V

That Clarice B. Covert was duly advised of the decision of the Board of Review on May 21, 1954, and was duly notified on 12 that date of her right to petition the United States Court of Military Appeals for a grant of review. That Clarice B. Covert filed a Petition for a Grant of Review with the United States Court of Military Appeals alleging that the Board of Review had erred in holding that the evidence was sufficient to support a finding that the accused was legally responsible when the act was committed. An authenticated copy of the petition filed on behalf of Clarice B. Covert with the United States Court of Military Appeals is appended hereto (Exhibit D).

VI

That in accordance with Article 67(b)(2) of the Uniform Code of Military Justice (50 U.S.C. 654 (b) (2)) The Judge Advocate General of the Air Force certified to the Court of Military Appeals questions concerning the instructions given by the law officer at the trial of Clarice B. Covert. An authenticated copy of the Certificate for Review filed by The Judge Advocate General of the Air Force is appended hereto (Exhibit E).

VII

That the Court of Military Appeals considered the Certificate of Review filed by The Judge Advocate General of the Air Force,

together with the errors assigned on behalf of Clarice B. Covert, and determined that a rehearing was required to avoid the danger of a miscarriage of justice. That the Court remanded the record of trial to The Judge Advocate General, United States Air Force, and ordered "that such proceedings be had in said case as will cause the convening authority to order a rehearing, if such rehearing is practicable". An authenticated copy of the decision and order of the Court of Military Appeals is appended hereto (Exhibit F).

VIII

That pursuant to the decision of the Court of Military Appeals, The Judge Advocate General, United States Air Force, transmitted a copy of that decision on July 11, 1955, together with the record of trial by court-martial of Clarice B. Covert, to the Commander, Headquarters Command, Bolling Air Force Base, Washington, with instructions "to take action in accordance with the decision of the United States Court of Military Appeals, and to order a rehearing if such rehearing is practicable". That Clarice B. Covert could have been returned to England for the rehearing of her case but it was determined to be both feasible and appropriate to have the proceedings in her case conducted by the Commander, Headquarters Command, Bolling Air Force Base, Washington, District of Columbia. A copy of the letter from The Judge Advocate General is appended hereto (Exhibit G).

IX

That on July 12, 1955 the Commander, Headquarters Command, ordered a rehearing of the case of Clarice B. Covert. An authenticated copy of General Court-Martial Order No. 17, Headquarters Command, United States Air Force, Bolling Air Force Base, dated July 12, 1955, announcing the results of appellate review in the case of Clarice M. Covert and ordering a rehearing of that case is appended hereto (Exhibit H). That the rehearing of this case has been tentatively scheduled at Bolling Air Force Base, Washington, D. C., for November 28, 1955.

14

X

That Clarice B. Covert was thereafter transferred from the Federal Reformatory for Women, Alderson, West Virginia, to Washington, D. C., and, there being no suitable custodial facilities for women at any military installation in the Washington area, the Director, Department of Corrections, District of Columbia, was requested to confine Clarice B. Covert in the District of Columbia jail pending her retrial by court-martial at Bolling Air

Force Base. An authenticated copy of the letter, dated July 13, 1955, from the Commander, Headquarters Command, to the Director, Department of Corrections, is appended hereto (Exhibit I).

XI

That pursuant to such request, Clarice B. Covert was confined to the District of Columbia jail on July 14, 1955 by the respondent. An authenticated copy of the receipt signed on behalf of the respondent indicating the confinement of Clarice B. Covert on July 14, 1955, is appended hereto (Exhibit J).

XII

That on July 15, 1955, the civilian counsel of Clarice B. Covert requested that she be examined as to her present mental condition and that for this purpose she be transferred for observation and examination to a suitable medical installation. An authenticated copy of the letter received by the Commander, Headquarters Command, from civilian counsel for Clarice B. Covert is appended hereto (Exhibit K).

15

XIII

That pursuant to this request, the Superintendent, St. Elizabeth's Hospital, was requested by The Judge Advocate General, United States Air Force, on July 21, 1955, to admit Clarice B. Covert to that hospital for a period of ninety days or such additional period of time as might be necessary "for psychiatric observation and diagnosis". That this request was approved by the Superintendent of St. Elizabeths Hospital on July 25, 1955, and Clarice B. Covert was thereafter transferred to that hospital for psychiatric observation and diagnosis. Authenticated copies of the correspondence relating thereto are appended hereto (Exhibit L).

XIV

That jurisdiction once lawfully attached is not lost by a subsequent change in status of a person subject to trial by court-martial under the Uniform Code of Military Justice.

XV

That this case is not controlled by the decision of the Supreme Court of the United States in the case of United States ex rel. Audrey M. Toth v. Donald A. Quarles, Secretary of the Air Force, as a rehearing is merely a continuation of the original proceeding, and does not involve an attempt to initiate court-martial proceedings after the return of Clarice B. Covert to the United States.

XVI

That an unbroken line of federal cases holds that it is within the constitutional power of Congress to provide for the trial by court-martial of persons accompanying the armed forces of the United States outside the continental limits of the United States, its territories and possessions.

16

XVII

That the issue of whether Congress may constitutionally provide that persons "accompanying the armed forces without the continental limits of the United States" shall be subject to trial by court-martial under the Uniform Code of Military Justice was duly raised by counsel for Clarice B. Covert at her trial by general court-martial and was determined adversely to her. That the Board of Review specifically considered the question of whether jurisdiction did in fact exist in the court-martial convened for the trial of Clarice B. Covert and determined that such jurisdiction did exist. That these determinations by the military tribunals must be accorded due consideration on this petition for a writ of habeas corpus.

XVIII

That competent evidence at the trial by court-martial established that the American Commander at Royal Air Force Station, Upper Heyford, England, executed a certificate which was delivered to an authorized representative of the United Kingdom stating that Clarice B. Covert was, on March 10, 1953, a person subject to the military laws of the United States and that, accordingly, no further action was taken in respect to Clarice B. Covert by representatives of the United Kingdom. That such certificate was executed by the Commander of Royal Air Force Station, Upper Heyford, England, in accordance with the Visiting Forces Act of 1942 which provides that *exclusive* jurisdiction over members of the United States armed

forces rests in the armed forces of the United States, that any
 17 person subject to military or naval law of the United States shall be deemed to be a member of the armed forces for the purposes of the Act, and that a certificate by an appropriate American authority that a person named and described in such certificate is or was at the time subject to military or naval laws of the United States shall be conclusive evidence of that fact. That the Visiting Forces Act of 1942 and the agreement of the United Kingdom to the exercise by United States military courts of exclusive jurisdiction in respect of offenses by members of the armed forces of the United States was based upon the assumption that the United States military authorities and the courts concerned would be able and willing to try and, on conviction, to punish all criminal offenses

which members of the United States armed forces may be alleged on sufficient evidence to have committed in the United Kingdom.

XIX

That the issue of sanity was given full and fair consideration by the military authorities during the trial and appellate review of the case of Clarice B. Covert and that issue may not be relitigated at this time in the Federal courts. *Burns v. Wilson*, 346 U.S. 137; *Whelchel v. McDonald*, 346 U.S. 122.

XX

Respondent denies each and every allegation contained in the petition for writ of habeas corpus except as hereinbefore specifically admitted, modified or explained.

18-39

XXI

Whereas, the respondent respectfully prays this Court that the order to show cause be discharged and petition for a writ of habeas corpus be dismissed:

LEO A. ROVER,
United States Attorney.

OLIVER GASCH,
Principal Assistant United States Attorney.

ALFRED BURKA,
Assistant United States Attorney.

JOSEPH J. F. CLARK,
Major, USAF,
Office of The Judge Advocate General,
United States Air Force,
Of Counsel.

EXHIBIT "C" TO RETURN AND ANSWER

Department of the Air Force

Office of the Judge Advocate General
Washington, D. C.

In the Board of Review, United States Air Force

Before BERG, Chairman, PISCIOTTA and ALLENSWORTH, Members
Judge Advocates

19 February 1954

AFCJA-23/5 ACM 7031

UNITED STATES

v.

CLARICE B. COVERT, a person accompanying the Armed Forces of the United States without the continental limits of United States and the possessions thereof.

SEVENTH AIR DIVISION

Sentence adjudged 29 May 1953 by G.C.M. convened at Royal Air Force Station Brize Norton, Oxfordshire, England, APO 125.
Approved sentence: Life imprisonment.

Appearances: Frederick Bernays Wiener, Esquire, Colonel Kenneth B. Chase and Major John J. Ensley, appellate counsel for the accused; Lt. Colonel Harold Anderson and Major William G. Carrow, III, appellate counsel for the United States.

DECISION—February 19, 1954

The Board of Review has reviewed the record of trial by general court-martial in the above-entitled case.

Upon trial, the accused pleaded not guilty to, but was found guilty of premeditated murder of her husband, Master Sergeant Edward E. Covert, in violation of Article 118, Uniform Code of Military Justice (Charge and specification). She was sentenced to life imprisonment. No evidence of previous convictions was considered.

The convening authority approved the sentence, designated
41 the Federal Reformatory for Women, Alderson, West Virginia, as the place of confinement pending completion of appellate review, and forwarded the record of trial to The Judge Advocate General, United States Air Force, for review by a Board of Review.

The facts and circumstances surrounding the unfortunate event

which gave rise to this prosecution and conviction may be summarized as follows:

At approximately 2:00 p.m., on 14 March 1953, the accused appeared at the Air Force Dispensary, Royal Air Force Station, Upper Heyford, England, pursuant to an appointment made the previous day. Her appointment was with Captain Ivan C. F. Heisler (USAF), a psychiatrist assigned to the 5th Hospital Group on duty at the dispensary at that station. In response to his first inquiry as to how the accused felt, accused stated "I killed Eddie last night" (R. 66). Accused further related that she had hit the victim with an axe and that at the time he was in bed, asleep and snoring. She "thought" she had killed the victim about eleven o'clock the night before, and she was "sure" he was dead (R. 66, 67). At the time Captain Heisler had no reason to suspect that the accused had committed a crime, and he thereupon proceeded to question accused momentarily to ascertain, in his own mind, whether what had been disclosed to him had actually happened. After several minutes he left the room and located Major (then Capt.) Holloway, base surgeon, and apprised him of the fact that he thought that an accident had occurred at the home of accused, and suggested that they investigate at the quarters of accused and the reported victim. Accused was left in the care of a nurse at the dispensary, and Captain Heisler, Major Holloway, and an Air Police Officer of the station proceeded to the home of the Coverts. On arrival at the quarters, the trio gained entrance by use of a key previously handed to Doctor Heisler by Mrs. Covert. On entering they immediately proceeded upstairs to the bedrooms. In one of two bedrooms they discovered two cots, only one of which appeared to have been slept in. On this particular cot was piled numerous blankets, with a bedspread over the top, and it appeared as though the bed had been hastily made up. On drawing back the covers of this particular cot there became visible on the bed the body of the deceased. A pillow covered the head, and there was in evidence a "good deal" of blood on the sheets and the lowermost blankets (R. 68). The body of the deceased was in a reclining position, on its back with the head somewhat to the left, with both hands resting in a sleeping position, over the chest. It was "quite obvious", without detailed examination, that the person was dead (R. 68). The party immediately departed from the premises.

Twenty minutes later Captain Heisler, in company with an agent of the Office of Special Investigations, returned to the scene. Without making a detailed examination, Captain Heisler observed several wounds on the body, primarily a large hematoma on the left side of the neck, which appeared to be a post mortem collection of blood, and also a few, "about" five, small triangular cuts on the

right side of the face, mostly on the cheek. (R. 68, 69). Prosecution Exhibits 12, 13 and 14 accurately portray the scene of the cot with the body thereon as seen by Captain Heisler on 11 March 1953 (R. 69-71).

The body was removed to the infirmary where a thorough examination was conducted. On examination, Major Holloway found evidence of a blow behind the right ear over the mastoid process and a small break of the skin at that point. There was evidence of bleeding from the right eardrum, and in addition there were multiple contusions, abrasions, and a few lacerations over the right side of the face. Major Holloway concluded, based on his examination, that there were fractured facial bones. In the opinion of this doctor, the cause of death was a fracture at the base of the skull, immediately below the tip of the ear, which may have been caused by the use of a blunt instrument.

During investigation at the premises of the accused and the deceased, a hand axe was discovered in a coal bucket near the fireplace in the front room, on the first floor of the quarters. Stains thereon were believed to be blood stains. Prosecution Exhibit 8, a hand axe, discovered by Mr. Servatka of the Office of Special Investigations, in the home of the principals, was received in evidence (R. 84). On 17 March this agent removed a pair of pajamas from a laundry tub in the home of the Coverts. It was apparent that this garment had not been washed, and it appeared to be in the same condition at the time of trial as when discovered (Pros. Ex. 10; R. 85, 86). By stipulated testimony of Professor James M. Webster of the West Midland Forensic Science Laboratory, Birmingham, England, it was established that the stains appearing on the hand axe (Pros. Ex. 8) were human blood and that the stains on the pajamas (Pros. Ex. 10) were likewise human blood (Pros. Ex. 11, R. 63).

An autopsy was performed on the body of deceased on 12 March 1953 by Doctor Raymond Winston Evans, pathologist at the United Liverpool Hospital and the University of Liverpool, England. This autopsy revealed multiple injuries to the face, particularly on the right side, of an incisional character, especially in the quadrilateral formed by the tip of the nose and the upper lip. There was a hematoma on the right side of the skull and, under this, a depressed fracture with the fractured fragment of the skull depressed into the cranial cavity. Examination of the open skull revealed injury to the brain, and it was the conclusion of this witness that death had been due to injury and hemorrhage of the brain, resulting from the depressed fracture of the skull, together with the multiple injuries of the right side of the head. Further examination of the body proper revealed no evidence of disease. The stomach disclosed the presence of some blood, probably due to

swallowing of blood by the deceased, following fracture of the skull. The abdominal organs appeared otherwise healthy, as were also the heart and lungs. There was no evidence of injuries affecting the torso or the extremities. Examination of the blood for alcohol, morphia and opiates proved negative. The opening in the skull was approximately two inches by one and one-half inch in diameter and "were most likely due to a blunt instrument" and could have been caused by use of Prosecution Exhibit 8 [hand axe] (R. 94-96).

On 16 March 1953 accused was interviewed at the United States Air Force Hospital, Burderop Park (England), by Major Furs, an agent of the Office of Special Investigations in the presence of Lieutenant Colonel Martin, chief psychiatrist of that hospital and Special Agent Serratka, previously referred to. Accused was advised by the investigator of the provisions of Article 31 of the Uniform Code of Military Justice and of the offense of which she was suspected (R. 73). On inquiry accused acknowledged that she understood the explanation of the provisions of Article 31 of the Code, stating in effect "Then I don't have to say anything", to which the three officers identified above replied in the affirmative (R. 74).

Accused then related the following facts and events:

44 On the evening of March 10 accused's husband arrived home at the usual time. Accused had been visiting a neighbor, a Mrs. Scamordella. There had been no argument. The deceased had retired at the usual time, attired in a two-piece pajama suit. When asked about incidents surrounding the offense, accused appeared vague, being certain only that "He was asleep, and I was ready for bed". On being queried as to whether she had used an axe, accused replied in the affirmative, but she was unable to recall how many times she had used it. She further stated that she did not know why she committed the act but that "No one else did it but me. I plead guilty". During the years since their marriage, her husband had drunk to excess; that he gambled, and that this had frequently led to financial difficulties. Once he became heavily involved with the American Express Company as a result of gambling at Ruislip (England). Previously, in 1948, he had suffered similar difficulties at Williams Field in the United States. He had forged checks as a result of gambling, and it had become necessary for accused to cash certain insurance policies in order to raise funds to redeem the forged checks. An unfortunate transaction involving the sale of an automobile by her husband had operated to their financial detriment. Her husband had no sense of financial responsibility. All he thought of was wine, whiskey and having cars, and as a result they could never get ahead. While stationed at Upper Heyford, the deceased usually came home late in the evening. He ignored the children, and he gave no thought to their future. Concerning a legacy which she had inherited from an aunt, deceased had frequently stated that he intended to buy a new

car and tour Europe. In the past deceased had struck the accused. While in the United States, she had once filed for a divorce but that the parties became reconciled before finality of the proceedings. Following receipt of information of the legacy in January of 1953, accused became restless and couldn't sleep. She worried about her father returning to claim a share of her inheritance, and she was greatly disturbed over her husband's views about spending the money. On one occasion at the non-commissioned officers' club at Royal Air Force Station, Upper Heyford, the deceased had become intoxicated and had insulted accused, who had gone to the club in search of her husband. Accused was particularly distressed as her husband had promised that she and a neighbor friend could go to Oxford that day, but as a result of deceased's intoxication and failure to return home, their departure was delayed, and accused became very upset. On the night of March 10, she had been dressed in flannel pajamas, and after the incident, she had placed these in a dirty-clothes tub.

At approximately 1:30 or 2 o'clock in the afternoon of March 11, 1953, accused was seen by a neighbor, coming across the green, proceeding toward the nursery. She had taken her two children to the nursery, and she returned alone (R. 79-80). Mrs. Covert arrived at the nursery with her two children at approximately half past 1 o'clock in the afternoon of March 11. She appeared very pale and on inquiry as to her health, stated that she felt "all right". As she departed she seemed to stagger, and she had difficulty in locating the knob of the door (R. 163, 164). Shortly after 2 o'clock in the afternoon of the same day, one Airman Goodwin went to the Covert quarters to discuss some work projects with deceased. His knock on the door failed to bring a response, however, he did see Mrs. Covert inside the house, through the window. Accused then appeared at the door and, in response to Goodwin's question, advised the latter that the deceased was not in. At the time Mrs. Covert was fully dressed and appeared to be "grouchy" (R. 80-83). When Agent Servatka of the Office of Special Investigations found Prosecution Exhibit 8, the hand axe, it was resting in a coal pail near the fireplace in the living room of the Covert home. Prosecution Exhibit 10, the pajamas, were removed on 17 March from a laundry tub in the same home. There was no evidence to indicate that these garments had been washed, and the stains appearing thereon were then, as at time of trial, visible (R. 83-86).

At approximately 5:30 o'clock in the evening of March 10, deceased called for his wife at the home of a neighbor, Mrs. Seamordella. Deceased appeared to be in good health. After a visit of approximately a half hour, the Coverts left (R. 53-54). The social acquaintanceship of this witness and the Coverts extended back to the month of January. Mrs. Covert had previously discussed with

her the former's concern over deceased's drinking habits, and once expressed the opinion that unless deceased was able to correct his habits in this regard, something "might happen". On one occasion she mentioned returning to the United States because of the distasteful conduct of her husband and because of the illness of her children. In response to a question as to how she felt, Mrs. Covert stated that she felt "pretty good". She did not appear upset or nervous. Mrs. Seamordella considered the Coverts an average, contented family, and there was never any fighting or squabbling. Mrs. Covert had declined her husband's suggestion that she go to a bingo game on the evening of March 10 with the witness, preferring to remain at home rather than go without him. When they departed, their relations appeared perfectly harmonious. During the period January to March, Mrs. Covert had frequently complained of her inability to sleep, her concern over the health of her children, and her own ailments (R. 86-93).

On one occasion in February 1953, accused was to accompany a friend, a Mrs. Anton, on a shopping trip to Oxford. Deceased, who was to attend the children, failed to return home as he had promised. This necessitated going to the noncommissioner officers' club in search of him. Deceased had been drinking considerably, and accused complained of having been insulted and abused by him at the club. She was extremely nervous and upset, and she related to the witness previous experiences of having been struck and abused at the hands of her husband. Once they separated, and accused applied for a divorce. However, four months later the parties rejoined one another, and the divorce proceedings were halted. Deceased's drinking and gambling habits and general irresponsibility frequently resulted in loss of friends. Referring to a legacy from a deceased aunt, accused stated that if she shared in the estate she would leave her husband—she was going to "kiss him goodbye". Several days after the Oxford shopping trip, Mrs. Covert informed the witness that when she returned from Oxford she found deceased drunk and "passed out", the children had over-run the house, scribbled on the walls, and the premises were in general disarray (R. 96-99, 102). Mrs. Covert first commenced complaining about her inability to sleep, nausea, other illnesses, and concern for her children in January and February 1953 (R. 100-102).

The foregoing narrative statement is a résumé of the evidence introduced by the prosecution as to the essential facts upon which the alleged offense is predicated. The following statement is a summary of evidence introduced by the defense in behalf of the accused, including evidence concerning the question of sanity of the accused. As sanity of the accused is one of the principal issues in this case, additional evidence pertinent thereto introduced by

the defense and the prosecution will be related during consideration of the assignment of errors filed by appellate defense counsel, in a subsequent portion of this opinion.

Accused as a witness in her own behalf testified that she was born at Augusta, Georgia, on December 21, 1920, following the second marriage of her mother. Her childhood was an unhappy one, marked by frequent disagreements between her parents. Accused was once told by her mother that her father had attempted to throw accused out a window, and on one occasion he had attempted to choke accused. In the year 1926, accused's father left the family. However, he later returned, but in 1932 he "deserted us for good". Accused's recollection of her father is one of cold indifference on the part of the latter, her father did not love the accused because she was not a boy. Accused's father demonstrated his dislike by bringing her gifts and toys designed for boys such as drums, footballs, fishing rods and tool chests. Her father was plagued with financial difficulties, occasioned by gambling, and he was never long able to retain steady employment. Accused felt unwanted, alone and afraid, she never enjoyed parental love. She never felt free to invite her friends to her home because she was ashamed of the place in which they lived, which she described as a dirty, broken down three-bedroom house, next to a chicken yard and an alley. During her high school years accused was reticent because she felt she was "different" from other students, and she purposely avoided coming in contact with others.

Following completion of high school, accused entered nurses' training, having left her home because she felt she was not wanted. She met her husband (deceased) on a blind date at Camp Blanding, Florida, in January, 1943. In the month of March of that year they were married. Deceased was then a second lieutenant in the Infantry. In May of 1943 deceased went overseas to Africa and Italy, and returned in November, 1945. While overseas, deceased encountered numerous financial difficulties, and on one occasion, accused was compelled to send her husband six hundred and twenty-nine dollars or he would be "thrown in the stockade". In November of 1945, deceased was released from the service. He was not interested in college or settling down. Most of his time was spent in drinking and in spending five thousand dollars which accused had managed to save during the war. In March, 1946, deceased re-entered the service (Air Force) as a master sergeant. During his tour of duty at Williams Air Force Base (Arizona), deceased again became engrossed financially, once involving a matter of a two hundred and fifty dollar check drawn on a bank in which he had no account, and again during accused's first pregnancy, deceased suffered a four hundred and fifty dollar gambling loss, resulting in an overdrawal of their joint bank accounts.

Accused's first child was born on November 11, 1947. At that time their savings had been entirely depleted, and it was necessary to convert an insurance policy to cover the expenses incident thereto. The second child was born on September 20, 1950. While stationed in Arizona, the parties purchased a farm, necessitating expenditure of all of their savings and which resulted in a complete financial loss.

In February of 1948, accused, as a result of her husband's financial difficulties and losses, moved with her infant son and mother to Phoenix, Arizona, where accused obtained employment. After a few months she returned to her husband because "I couldn't stay away from him. I was a nervous wreck the whole time I was away from him. I couldn't eat; I couldn't sleep; I couldn't even hardly hold my job down". After returning to her husband she suffered no difficulties such as she had experienced during the separation.

In May, 1951, deceased was assigned to duty in England with the Seventh Air Division. In September of that year accused joined her husband, residing temporarily in London. Shortly after her arrival in England, the parties learned that their household goods, which had been left behind, had been destroyed by fire. This caused accused considerable worry. In addition, she was concerned with the health of the youngest son, particularly the fact that he had never showed any inclination to speak, although he had reached the usual age for this development. Deceased drank less than usual but continued to gamble. In July of 1952 deceased was transferred to Upper Heyford, and accused was most desirous of joining him at that station.

In December of 1952 accused was informed that she was about to inherit a sum of money, but the actual amount was unknown. Immediately her husband (deceased) indicated his desire to purchase a new automobile, and he planned and discussed a European trip. Accused on the other hand "didn't want to touch the money". She wanted to place it in trust for the education of the children, for a home, and for retirement. Although this diversity of opinion was not a source of friction or disagreement, it cause accused considerable worry. Following news of the inheritance, accused suffered a feeling of "dying", "passing out", and not being able to "go on". She sought aid at the infirmary but was told that in the absence of a fever no emergency existed, and she returned home. The expected inheritance had not caused accused to consider separation from her husband, although she had once asked him to "put in the papers". She felt she could not leave him, she had "tried it before, and it just didn't work".

Shortly after her visit to the infirmary accused obtained an appointment with Doctor Cogar, and on being examined by the latter for blood pressure, heart condition, etc., she was informed that she

needed sedation. Her complaint was an inability to eat or sleep. She was given a bottle of phenobarbital and advised to return later for further examination. The medicine proved ineffective, however, and accused's condition became progressively worse. Further examination led to information that accused suffered toxic goiter, with a recommendation for hospitalization for a period of four to six weeks. Accused thereupon entered Burderop Park Hospital where she underwent further clinical tests. These tests disclosed no organic difficulties, and accused was discharged, having been supplied with a quantity of sleeping tablets. On the night of 7 March, accused took four of the blue tablets (which she received at the hospital). Her testimony relative thereto is as follows: "I don't know why I took them. I didn't know whether they'd kill me or whether—or what would happen, but I just took them" (R. 122). She awakened at approximately 11 o'clock the next day, March 8. During the day, accused was beset with morbid thoughts, crystalizing on events in bygone years. Her desperation finally drove her to leave the dinner table and go to the dispensary. There she conferred with Major Westbrook, who arranged an appointment for accused for the next day with Doctor Cogar.

On March 9, Mrs. Covert, pursuant to the appointment made the previous day, visited Doctor Cogar. Accused informed the doctor that she desired hospitalization, that "there was something wrong with me; that I had to go that night; that if he didn't take me, I was just going to explode" (R. 123). Apparently unable to effect hospitalization of accused, Doctor Cogar prescribed certain "red" tablets, similar to those he had prescribed on prior occasions for accused. That evening she took two of these tablets. During the night of March 10, accused consumed the remainder of her supply of blue and red tablets, all "that I could find". Since March 11, accused had been hospitalized, and during this period she was informed of her pregnancy (R. 113-124).

Accused further testified on cross-examination that her recollection of taking the pills in the evening of March 10 was vague, but she believed it must have been around midnight. She was unaware of the possible effect of the pills, nor did she recall why she had taken them, except that her condition was such that she did not care whether she lived or died. Recounting events of her childhood, accused related that she was born prematurely, and that as an infant she had not been expected to live; her parents had selected a coffin for her burial; and she was plagued with the thoughts of her father's cruelty towards accused and her mother. Accused reiterated her inability to remember how many pills she had taken, but she definitely remembered having taken all of the red and blue pills she had on that date (R. 124-132).

Defense evidence, other than the testimony of the accused, was offered and received. From July 1952 to March 10, 1953, Master

Sergeant Covert had been assigned to an Air Installations Squadron. Although he at first appeared efficient, it soon became apparent that he lacked the capabilities of an airman of that grade and as a result, it was necessary to frequently reassign him. His judgment was poor and of a "childish" nature. He gambled regularly, at least once or twice a month, and he was financially irresponsible. Bad checks were frequent which deceased paid only after repeated insistence of his superiors (R. 133-152; Def. Exs. B, C, D; R. 165-168). In the opinion of neighbors, accused and her husband appeared to get along well, and there were no public demonstrations such as quarrels or disputes indicating other than that they were an amiable couple (R. 153). Mrs. Covert's principal worry seemed to be her concern for the health of her children (R. 172-179).

By stipulation, Mrs. May Barksdale, accused's mother, testified that accused's father was a squanderer; that he delighted in tormenting accused with his cruel behavior; that he had never
51 loved his daughter because she was not a boy; and that accused was the constant target of his mean, sadistic disposition (Def. Ex. F, R. 170). Further stipulated testimony established that accused had inherited an estate of the approximate value of forty thousand dollars, which matter had become final and conclusive at the time of trial (Def. Ex. G, R. 171).

On 3 March 1953, accused had received fifteen capsules of sodium amytal, each of three grains, pursuant to prescription, at the pharmacy of the 5th Hospital Group, Burderop Park, England (Def. Ex. H, R. 172).

Captain Cogar, an Army Medical Doctor, treated accused at Upper Heyford Base Infirmary on 16 and 19 February and 9 March 1953. On 16 February, he prescribed mild sedation for the patient because she showed a state of nervous anxiety, and he advised her to return in three days. On 19 February, her condition had not improved. However, a complete medical evaluation disclosed no organic illness. On 9 March, Mrs. Covert appeared even more upset and emotionally disturbed. She stated that she felt as though "something were about to let go", and that if something was not done to relieve her condition she feared something serious might happen. Although Captain Cogar believed that she was extremely emotionally upset, he did not consider that she suffered from any mental disease. However, he decided that psychiatric treatment should follow. He thereupon made an appointment with Captain Heisler, a psychiatrist at the 5th Hospital Group. Prior to dismissal, accused was given seven capsules of seconal of one and one-half grains each, similar to six such tablets furnished her on 19 February, the prescribed dosage being one capsule each night, to be followed by a second capsule if sleep was not induced (Def. Ex. I, R. 234). On 10 March, Captain Heisler interviewed accused for approximately one and one-half hours. At the time she showed

symptoms of severe anxiety and agitation, requiring psychiatric attention. She recounted a history of illness extending over the preceding three months, of lack of interest in normal activities, difficulty in sleeping despite medication, and a constant, vague feeling of uneasiness and anxiety, commencing with receipt of information of her prospective legacy. She related her childhood difficulties with her father, his resentment and cruelty. Hospitalization during the period 25 February to 3 March had uncovered no physical ailments, but instead of alleviating her symptoms, they became progressively

52 worse. In the opinion of the doctor, there was no need for immediate hospitalization. An appointment was arranged for the next day, and accused departed (R. 181-186). Earlier, while testifying for the prosecution, this witness had stated that he graduated from Stanford School of Medicine in 1947; that he interned at San Francisco County Hospital; and that he had served a one-year residency there; his professional experience further included one year of internal medicine with the United States Army in Europe, and he has been engaged in active professional duties in the field of psychiatry continuously since entering the Air Force in 1951.

The next day, 11 March, accused appeared at the hospital pursuant to her appointment. She was dressed in slacks and a leather jacket; her hair was uncombed, and she looked disheveled and obviously distressed. Then followed the conversation set forth in a preceding portion of this opinion, wherein accused acknowledged having killed her husband the night before, adding "I guess I hated him like I hated my father" (R. 186-187). Accused remained at the infirmary during the greater part of the afternoon. She appeared completely detached and showed no emotion or concern for the increased activity surrounding her (R. 222). Considering her condition at that time, together with the information gained the preceding day, Doctor Heisler found evidence of a psychotic disturbance; that accused had "gone into a psychotic depressive reaction". Subsequent information led to the conclusion that accused was in a very profound depressive state at the time of her visit on 11 March and not mentally responsible for her acts (R. 188, 189, 214). Since 11 March this officer has spent approximately forty hours interviewing accused, most of which occurred subsequent to 28 March. These interviews involved probing into accused's early childhood, her difficulties, and her life in general up to that time. Events in her married life paralleled those of her youth, her husband drank, squandered money, stayed away from home, and failed to bestow parental love on the children. All of these events gave rise to a feeling of failure on the part of accused. During adolescence accused, as a result of her ungainly height and over sensitivity incident to wearing glasses at an early age, suffered additional distress. Normal developments of a child of her age were character-

ized by her parents as portending dire consequences. She made few attachments and lacked security. Following marriage, 53 her whole life was devoted to raising her children, in whom she took refuge, rather than meeting the challenges of ordinary normal family life. Because of deceased's conduct and attitude she assumed the major responsibility for the family. Deceased's actions towards the children had caused the oldest son to develop marked resentment and hostility towards his father, further adding to the distress of accused (R. 190-194). A combination of all of the preceding factors developed within accused a strong feeling of ambivalence, an unresolved conflict of love and hate for a given person or object. When a person, as a result of unresolved conflicts becomes so disturbed that external realities are grossly misinterpreted, and resort is had to irrational solutions of a problem facing the patient, a psychosis exists. Psychosis is likewise indicated where the patient, as a result of severe depression and reoccupation, is unable to take reassurance in the ordinary manner of doctor-patient relationship, and when this condition is coupled with amnesia, psychosis does exist (R. 195-206). In the opinion of Doctor Heisler, accused on the night of 10 March suffered a mental defect which he characterized as a psychotic depressive reaction, which rendered her incapable of knowing that an act of premeditated murder was wrong. Her mental condition completely deprived her of the power of choice or volition, and as a consequence, she was unable to adhere to the right. No resistance, short of physical restraint, would have deterred her, and a policeman standing at her side, without more, would have probably not even have been noticed, much less provided the restraint necessary to overcome her impulses (R. 207-208).

On cross-examination, Captain Heisler testified that accused was definitely not psychotic when she left his office on 10 March, basing his opinion on that single interview. However, on the night of 10 March accused was a psychotic depressive and emotionally insane, even though she was capable of carrying out certain volitional acts. In arriving at this conclusion, the witness placed considerable weight on the fact that accused had attempted suicide in the face of her love for the children. This, taken together with the fact she admitted having spent the night in bed with her husband after he was dead, established that she was totally devoid of any appreciable sense of reality, and, therefore, psychotic. The psychotic episode on the night of 10 March was of brief duration, and at the time of trial accused was perfectly sane, although suffering a moderately severe neurotic personality problem (R. 208-217). The attempted 54 concealment of the body with blankets and pillows by accused to prevent the children from discovering the corpse was a natural act and one which could easily have been comprehended by a psychotic (R. 218-219). In the doctor's opinion, a suicidal

tendency which accused harbored at the time of her visit to his office on March 10 changed to a homicidal tendency sometime between her departure and commission of the act, which is a common characteristic of a psychotic depressive reaction (R. 224-225).

Subsequent interviews revealed that prior to March 10 accused had previously contemplated suicide, having once formulated a plan of dashing herself in front of a bus. At one time, she had taken four barbiturate tablets for the express purpose of killing herself. After March 10 she was kept under a "suicide watch" in the psychiatric ward (R. 228). A person of accused's size and weight consuming twelve grains of sodium amytal would ordinarily sleep eighteen to twenty hours, and this would be considered a normal dose for sedation of violent persons. Eighteen grains of sodium amytal might constitute, but not necessarily, a fatal dose (R. 198). Based on the facts learned during numerous interviews, this witness was of the opinion that the act was one of psychotic depression, despite the fact that the sanity board had diagnosed accused's condition as "disassociative reaction" (R. 293).

Further evidence adduced by the defense in rebuttal as to the issue of sanity will be set forth infra, following a summarization of evidence introduced by the prosecution on this issue.

Following introduction into evidence of the testimony summarized above, the prosecution responded with the testimony of three expert witnesses. Captain James H. Graves, assistant chief of psychiatry at the 5th Hospital Group testified that he was a graduate of Northwestern University School of Medicine. Following graduation he served as a research fellow, Institute of Neurology, Northwestern University, for a period of two years, leading to a Master of Science degree. Prior to his present duty assignment, he served for a period of two years as chief of psychiatry, Keesler Air Force Base Hospital (Biloxi, Miss.). He is familiar with the provisions of paragraph 121 of the Manual for Courts-Martial and the provisions of Air Force Manual 160-42, Psychiatry in Military Law, and feels bound by those publications.

55 As a member of a sanity board, consisting of the witness and two other psychiatrists, Captain Graves had occasion to examine and evaluate the accused's mental condition. In his opinion, the accused was at the time of the commission of the alleged offense, able to distinguish right from wrong, and to adhere to the right. Likewise, at time of trial accused was able to understand the charges against her, and to cooperate in her own defense. There has been no substantial change in his opinion concerning accused's mental responsibility. Accused did not act under an irresistible impulse as defined in Air Force Manual 160-42, and if a policeman, or someone else were present, accused would not have committed the act. From his clinical examinations, Captain Graves concluded that accused's thinking processes were not dis-

turbed, that is, her intellectual capacity and moral senses were within normal limits. There was no evidence to indicate that accused could not adhere to the right. On the contrary, evidence as to this factor was more negative than positive (R. 242-244).

Captain Graves first saw accused on her entry into the hospital on or about 13 March, and his first interview with accused was on the fourteenth. Three or four more interviews followed prior to the board proceedings on 23 March. Following drafting of an original report of the proceedings, the entire report was re-written by all of the members, including the witness, Colonel Martin and Captain Troy. The board considered a "write-up" previously prepared by Captain Heisler, and also the accused's past history and behavior, as well as her present behavior, in detail. At the time of the board proceedings, no formal charges had been presented for the board's consideration, and any information as to the nature of the offense was that contained in Captain Heisler's report previously referred to. Examinations revealed a lifelong history of neurosis, and after the incident, a clear-cut picture of a "severe psychoneurosis—a severe neurosis". However, there was no evidence of a marked thinking disturbance or of an abnormal emotional condition, and although depressed, the accused had not been unusually abnormal (R. 245-251). This is characterized in psychiatry as a dissociative reaction which means that, for a temporary period of time, the patient's personality does not function as a whole. Certain forces are set temporarily aside, and others come forth, and for a period, control the actions of the patient; a more or less temporary

56 "brushing aside" of the victim's conscience. This, however,

is not psychosis and does not involve mental disintegration or deterioration. In the opinion of the witness, there was a partial weakening of power to adhere to the right and to know right from wrong and to act accordingly. Accused, however, still possessed the mental capacity to adhere to the right and to know the difference between right and wrong, and her "disassociation" would not have produced the crime for which accused was now on trial (R. 252). This is not considered a true psychotic state, and it is only rarely that a dissociative reaction develops into complete abrogation of the patient's conscience. Had such a condition occurred, there would have been subsequent evidence thereof upon which such a diagnosis could be founded. Captain Graves found no such evidence. In the opinion of the witness, accused was capable of knowing the act was wrong, but he was further of the opinion that she had not planned the act in that she considered the "pros and cons" or the consequences, and he did not believe that "this thing is premeditated". Evidence of suicide attempts might, but does not necessarily bear a close relationship to the victim's sanity. Under existing regulations and manuals and the legal tests of sanity as set forth therein, the witness could only conclude that the accused

suffered a neurotic reaction (R. 253-257). Under these authorities, impairment of the ability to distinguish right from wrong, or adhere to the right, has no effect on criminal responsibility, and according to the standards laid down in Air Force Manual 160-42, the accused was, on 10 March, mentally responsible in a criminal sense (R. 258-264).

Another witness on behalf of the prosecution was Lieutenant Colonel Richard L. Martin, chief of professional services, 5th Hospital Group; and consultant to the Surgeon, United States Air Forces, Europe. Colonel Martin graduated from the Ohio University Medical School in 1943 and completed internship in the U. S. Military Hospital in 1944. He is a graduate of the Military School of Neuropsychiatry (May 1945), and since that time, his primary duty has been in the field of psychiatry, including three years residency training in neuropsychiatry at Walter Reed General Hospital. His present assignment commenced in January 1951 (R. 266).

Colonel Martin served as a member of the sanity board that considered accused's case. Based on his observations and findings, and as a result of his individual examinations of the patient, this witness was of the opinion that at the time of the commission of the offense, the accused was able to distinguish right from wrong and—with certain qualifications—was able to adhere to the right. However, there was some impairment of her ability to adhere to the right (R. 267).

In cross-examination, defense counsel elicited that the witness had observed accused for varying periods of time between 11 and 23 March, including six to eight hours of actual interview. Based on his examinations, interviews, and consultations with other members of his staff, and with particular consideration to the facts found by Captain Heisler, Colonel Martin concluded that the severity of accused's illness impaired her ability to adhere to the right, even though she was not psychotic at the time of the offense. This was a dissociative reaction which was of such degree accused performed an act not within her normal behavior pattern. In his opinion, the mental mechanisms which controlled accused's normal behavior had been so severely impaired functionally that she had no regard for right or wrong—that it did not make any difference to her (R. 273). While a psychotic state may be classified as a dissociative reaction, it does not follow that the converse is true. The latter may not be sufficiently severe to constitute a psychotic state. Colonel Martin's opinion was the same at time of trial as at the time of preparation of the sanity report. "There is [was] no evidence of premeditation or of prior consideration of the act. . . . the deduction . . . was hastily arrived at and impulsively carried out, without prior consideration or planning" (R. 274). However, accused was capable of forming the necessary degree of intent to bring the act about. The act was not the result

of an irresistible impulse, based on the standards prescribed in Air Force Manual 160-42. Although the witness has not changed his opinion as to accused's sanity since his original findings, more convincing evidence has come to his attention since that time which indicates even more serious impairment than originally determined, but his conclusions as to accused's mental responsibility remain unaltered (R. 275-276). According to medical tests, accused is pregnant (R. 277).

The final witness for the prosecution on this issue was Major Richard E. Troy, assistant chief of neuropsychiatric service at Burderop Park Hospital (England). This officer graduated from the University of Colorado School of Medicine in 1947, interned at Salt Lake City County Hospital in 1947 and 1948, and later
58 served a three year residency in psychiatry at the Colorado

Hospital in Denver. Since that time his duties in the Air Force have been exclusively in psychiatry. He was recently certified by the American Board of Neurology and Psychiatry as a member in psychiatry. He is the only psychiatrist at Burderop Park Hospital having been accorded this recognition (R. 277).

Major Troy was likewise a member of the sanity board that considered accused's case. Based on his observations and examinations of accused, he was of the opinion that the accused suffered no mental defects; disease or derangement which would affect her ability to distinguish right from wrong, nor her ability to adhere to the right, with respect to the offense for which she was on trial. In his opinion, accused did not act, on 10 March, as a result of an irresistible impulse as defined in the military manuals, and further, that accused would not have committed the act had there been a policeman at her side (R. 278).

On cross-examination of Major Troy, defense counsel brought out that the witness had spent approximately three to three and one-half hours with accused, although he had interviewed accused prior to the alleged offense. In the opinion of this witness, accused was on the night of the alleged offense mentally responsible, although her ability to adhere to the right may have been impaired. This conclusion was based on accused's history of ambivalence, resulting in a "dazed, impaired perhaps" state of mind. When he examined the patient after the offense, her feelings fitted into a pattern wherein all of her thoughts towards her father re-mobilized and she saw her husband, whom she described as irresponsible, a drinker, etc., in the same light as she remembered her father. She saw in her husband a potential obstacle to all of the things she wanted to do for her children with the legacy. On the night of the offense " * * * this extreme tension and mixed-up feeling[s], depression, * * * sort of came to a head, almost overwhelmingly, to the point that she, * * * operated almost in an automatic or dazed manner." Further, the ambivalence, mixed feelings and de-

pression, her desire to give her children something, thoughts of her futile and ruined life, a feeling of nothing to gain, and many other factors all contributed to any impairment accused suffered at the time (R. 280). However, accused did possess sufficient capacity to form an intent and was capable of premeditation; common to the nature of the offense charged (R. 285).

59 The court took judicial notice of Air Force Manual 160-42, Psychiatry in Military Law (R. 285).

In rebuttal, the defense called as a witness Captain N. R. Edelson,* clinical psychologist at the 5th Hospital Group, Burderop Park. This officer detailed his qualifications as including sixteen to seventeen years' experience in applied fields of psychology of which six or seven years were devoted to clinical psychology. Approximately thirty-six hours after the fatal act, he commenced administering a series of psychological tests to accused, including the following standard tests: the Wechsler-Bellevue, the Bender-Gastalt, the HTP, the Mackover, the TAT, the Cornell Index, the Minnesota Multiphasic, and the Rohrschach. Based on the results of these mental tests at the time given, this witness was of the opinion that the accused on 10 March was of extremely limited mental responsibility, and his clinical diagnosis of her condition was parapsychizophrenia. This is considered a psychotic state (R. 288, 190). The presence of a policeman at the side of accused at the time of the fatal act would not have "resisted" accused any more than would the presence of the United States Army "in toto." In the opinion of Captain Edelson the findings of the sanity board were ridiculous (R. 290-292). He had submitted the results of his tests to Colonel Martin within a day or two after completion (R. 290). [Presumably prior to the board proceedings.]

Captain Heisler, recalled as a witness for the defense, reaffirmed his conclusions that on March 10, accused was in a true psychotic state, despite the testimony of Colonel Martin, Major Troy, and Captain Graves to the contrary, (R. 293). A psychotic episode of short duration would not necessarily leave evidence of residuals (R. 295). On being further recalled as a court witness Captain Heisler testified that, in his opinion, accused would not be a menace or danger to society (R. 313).

In her request for appellate counsel, accused has urged that the proceedings are fatally defective for the reason that the law officer of the general court-martial, Captain Charles W. Denham, had been relieved, it is contended, from active duty prior to trial. Were this true the court-martial would have been improperly constituted, and we would have no difficulty in holding that the court-martial pro-

* The affidavit is made by Capt. Edelson, however, the record refers to him as Edelson.

ceedings are in law fatally defective. However, we do not find such to be the case. Our conclusion in this regard is based on
60 examination of the official records and files of the Department of the Air Force concerning this officer, of which we are authorized, and do, take judicial notice (MCM, 1951, par. 147; ACM S-7080, Murphy, — CMR — [8 Oct. 53]; ACM 6630, Williams, 9 CMR 815; ACM S-5552, Robinson, 9 CMR 685; ACM 5197, Dorée and Hicks, 5 CMR 756; ACM S-2019, Lamar, 2 CMR 731).

The official records on file in this headquarters establish that Captain Denham was on 3 March 1953 relieved from his unit assignment, and from extended active duty, effective that date, pursuant to the provisions of section 515, Public Law 381, 80th Congress, for the purpose of accepting voluntary extended duty, in an indefinite status (SO 47, Hq. 3909th Air Base Gp, APO 179, par. 9, dated 3 Mar. 53). On 4 March 1953 this officer was ordered to extended active duty in accordance with the provisions of Public Law 381, referred to above (SO 48, Hq. 3909th Air Base Gp, APO 179, par. 10, dated 4 Mar. 53). Simultaneously therewith Captain Denham executed the prescribed oath of office as a captain, United States Air Force, together with an agreement to remain on active duty for an indefinite period, not to exceed twenty-one months. He was finally relieved from active duty on resignation of his commission, effective 10 September 1953 (SO 211, Hq. Scott AFB and 3310th Technical Trng. Wg., Scott AFB, Ill, par. 40, dated 4 Sep. 53). As trial in the instant case was held on 25-29 May 1953, it appears quite obvious that there can be no question as to the military status of the law officer at the time of trial.

Appellate counsel for the accused has, by written assignment of errors, challenged the sufficiency of the evidence to sustain the findings of guilt and the sentence. Likewise, numerous errors have been assigned on the record which appellant contends require reversal of the conviction. These will be considered in a subsequent portion of our opinion. Though not urged as error before the Board of Review, defense counsel at trial level attacked the jurisdiction of the court to try accused by a motion to dismiss because
“ * * * a private citizen of the United States * * * is being tried for a capital crime, in violation of the Fifth and Sixth Amendments of the Constitution of the United States.” (R. 13). In support of the foregoing motion, the defense offered for consideration of the law officer Appellate Exhibit 2 (R. 13), which is a stipulation
61 between trial and defense counsel and joined in by the accused to the effect that during the period of 11 March 1953 to the time of trial the accused had been a patient in the psychiatric ward of the 5th General Hospital, Burderop, England, and that until 15 April 1953, accused was kept in a padded

cell, behind locked doors, with an Air Police guard posted outside the door at all times. Defense counsel argued that the Fifth Amendment of the Constitution had been violated because there had been no presentment or indictment of the accused by a grand jury. He further contended that, in the absence of a showing that the accused was a member of the military service, trial before a military tribunal amounted to a denial of liberty and perhaps life, without due process of law. Violation of the Sixth Amendment to the Constitution was predicated upon an unsuccessful attempt of the accused, prior to trial, to have appointed as members of the court-martial at least one warrant officer, airmen and noncommissioned officers, and additionally, dependent wives of officers, airmen or noncommissioned officers (App. Ex. 1, R. 13).

In order to establish jurisdiction over a civilian under the provisions of the Uniform Code of Military Justice (Art. 2[11]), it must be shown that such civilian was serving with; employed by; or accompanying the armed forces outside the continental limits of the United States, and beyond certain geographical limits specifically set forth in the cited article (U.S. v. Weiman and Czertok [No. 1403], 3 USCMA 216, 11 CMR 216; U.S. v. Schultz [No. 394], 1 USCMA 512, 4 CMR 104; CM 360857, Smith, 10 CMR 350; ACM 6341, Biagini, et al., 10 CMR 682; ACM 7255; Herrero, — CMR — [30 Oct. 53]). In each case the test is an objective one (McCune 1. Kilpatrick, 53 F. Supp. 80). The pertinent provisions of Article 2 of the Code provide:

"The following persons are subject to this code:

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by; or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;"

62 The wife of a member of the armed forces of the United States who accompanies her husband to, or joins him at his duty station in a foreign country, is a person "accompanying" the armed forces of the United States within the meaning of the quoted portion of Article 2 of the Code (Madsen v. Kinsella, Warden, 343 U.S. 341, 72 S. Ct. 699, 96 L. ed. 988; CM 360857, Smith, *supra*). Evidence introduced by the prosecution in support of its claim of jurisdiction to try the accused establishes the following competent facts of record: Prior to entry of the accused into the area (Eng-

land), it was necessary to first obtain permission for such entry from the Commanding General, Third Air Force (R. 21); pertinent regulations of the command concerned (3rd AF Reg. 34-18) prescribed the proceedings governing application for permission for dependents of service personnel to enter the United Kingdom, and for travel incident thereto (R. 19); that accused's husband, Master Sergeant Edward E. Covert, pursuant to the above-referenced authority, filed application for transportation of the accused and his dependent children to England (Pros. Ex. 7; R. 15, 16); that said application was duly processed in accordance with pertinent regulations, and in accordance therewith, the accused and her minor children were, as dependents of deceased, included upon a priority list for shipment from the United States to the United Kingdom (Pros. Ex. 2; R. 20, 21); that pursuant thereto, appropriate orders were issued by Headquarters, Third Army, Fort. McPherson, Georgia, authorizing accused's travel, together with her minor children, from the United States to England, at Government expense (Pros. Ex. 3; R. 22, 23); and that in accordance with the above authorization, the accused traveled to England via military surface transport (R. 23); that Government facilities at the point of embarkation and debarkation were utilized, and that the accused traveled in company with other civilian dependents of military personnel assigned to duty in England (R. 23-25). Upon arrival at Royal Air Force Station, Upper Heyford, England, the accused's husband, now deceased, was assigned public quarters (Pros. Ex. 4, 5; R. 26-27), and accused was issued appropriate authorization for commissary and post exchange privileges. Also, she received medical treatment at United States Air Force medical facilities at Upper Heyford, England, on at least three occasions subsequent to 15 February 1955 (R. 28-29).

At the time of the commission of the alleged offense, there was in existence what is commonly termed the Visiting Forces Act of 1942 (5 and 6, Geo. 6, Ch. 31), an agreement between the United States and Great Britain, the pertinent provisions of which provide that exclusive criminal jurisdiction over members of the United States armed forces rests in the armed forces of the United States. This act further provides that all persons who are by the law of the United States of America, at the time, subject to military or naval law of the United States, shall be deemed to be members of said [visiting] forces. Also, the act further provides that in respect to any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for that purpose by the Government of the United States, stating that a person named and described in such certificate is or was at the time subject to the military or naval laws of the United States, shall be conclusive evidence of that fact (App. Ex. 6,

R. 47). In accordance with the above referred to provisions of the Visiting Forces Act, the Base Commander of Royal Air Force Station, Upper Heyford, England, executed an appropriate certificate which was delivered to an authorized representative of the United Kingdom, setting forth that the accused was on 10 March 1953 a person subject to the military laws of the United States. Thereupon, no further action was taken in respect to the accused by representatives of the United Kingdom (R. 38-43). The Visiting Forces Act, 1952 (15, 16 Geo. 6, 1 Eliz. 2, Ch. 67), was not in effect at the time of the commission of the alleged offense (R. 47). In this connection, see the Agreement Regarding Status of Forces of Parties of The North Atlantic Treaty and the Resolution of Ratification, United States Senate, 15 July 1953 (AF Bulletin No. 21, 13 Oct. 53). Accordingly, jurisdiction in this case, if it existed at all, was in the United States Government. From what we have said above, there can be no doubt that jurisdiction did in fact exist in the court-martial convened for trial of the accused (McCune v. Kilpatrick, *supra*; Madsen v. Kinsella, *supra*; Perlstein v. United States, 151 F. 2d 167, in re Berue, D.C., 54 F. Supp. 252, Ex parte Jochen 257 F. 200; Hines v. Mikell, 259 F. 28, 39 S. Ct. 495, 250 U.S. 645, 63 L. ed. 1187; Ex parte Falls, 251 F. 415; United States v. Weiman and Czertok, *supra*; CM 360857, Smith, *supra*; ACM 6341, Biagini, et al., *supra*; ACM 7255, Herrero, *supra*).

Defense counsel's contention that the accused was denied due process may be answered by a simple restatement of the often quoted phrase that in the military or naval services of the United States, trial by military tribunal is due process (Reeves v. Ainsworth, 219 U.S. 296, 55 L. ed. 225, 31 S. Ct. 230; Ex parte Reed, 100 U.S. 13, 25 L. ed. 538; Johnson v. Sayre 15 S. Ct. 773, 158 U.S. 109, 39 L. ed. 914; Mullan v. United States, 29 S. Ct. 330, 212 U.S. 516, 53 L. ed. 632; United States Ex Rel Creary v. Weeks, Secretary of War, 42 S. Ct. 509, 259 U.S. 336, 66 L. ed. 973; Burns v. Wilson, — U.S. —, 97 L. ed. (Advance, p. 996). There is no requirement in the Fifth Amendment of the Constitution of the United States that persons tried by a military tribunal be proceeded against by presentment or indictment of a grand jury. In fact, the amendment by specific language excepts those cases arising in the land or naval forces, and in the militia. Hence, it necessarily follows from our determination that the accused was subject to trial by court-martial, that no presentment nor indictment by grand jury, as a preliminary requisite to the validity of the court-martial proceedings, was required.

With reference to accused's request, and the denial thereof, for appointment of warrant officers, enlisted personnel and dependent wives of military personnel as members of the court-martial, we are of the opinion that the convening authority acted properly in

denying such request. Article 25 of the Uniform Code of Military Justice defines eligibility to serve as a member of a court-martial. Under the provisions of that article, any officer on active duty with the armed forces is eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such court for trial. Any warrant officer on active duty with the armed forces is eligible to serve on general and special courts-martial for the trial of any person other than an officer who may lawfully be brought before the court for trial. Enlisted persons on active duty with the armed forces are eligible to serve on general and special courts-martial for the trial of any enlisted person brought before such court, who is not a member of the same unit as such enlisted accused, provided, however, that the accused has requested that the membership of the court-martial include enlisted personnel. The article further provides that the convening authority shall appoint as members of a court-martial such persons as in his opinion are best qualified for that duty by reason of age, education, training, experience, length of service and judicial temperament.

65 From the above, it appears quite obvious that there is no provision in the Code, nor has any other statutory authority been brought to the attention of the Board of Review, for appointment of civilians as members of a court-martial. Indeed it appears that appointment of a civilian as a member of a court-martial would be improper, and hence the court would not be legally constituted. As the accused in this case was not an enlisted person, there was no authority in law for appointment of an enlisted person as a member of the court-martial. The determination of whether a warrant officer should be appointed as a member of the court-martial rested in the sound discretion of the convening authority (Art 25[d][2], UCMJ). The accused is not except in the case of an enlisted person, authorized as a matter of law to indicate his preference in the composition of the court-martial (in this connection see CM 331859, Pierce, 80 BR 199 and cases cited at p. 201; see also ACM 6341, Biagini, et al., *supra*).

Appellate defense counsel's first assigned error challenges the correctness of the court's findings as to the sanity of the accused. The second assigned error attacks the validity of the (court-martial) proceedings on the grounds that expert witnesses were limited in their expression of psychiatric opinion on account of the provisions of Air Force Manual 160-42 (Psychiatry in Military Law). It is the contention of appellant's counsel that this manual was changed in a material respect shortly prior to trial. The disposition of the first two assigned errors requires consideration by the Board of Review of a substantial portion of the evidence introduced at trial, the effect of the service manual referred to and,

additionally, consideration of certain post trial affidavits filed by several of the witnesses who testified on behalf of the prosecution and the defense at trial. For this reason, the Board of Review will consider assignment of errors one and two together.

At the outset we acknowledge that the Board of Review, in considering the question of sanity of the accused, may make an independent determination of that issue, and, in so doing, we may go beyond the bare record of trial in order to obtain and evaluate all available information which will be of aid in resolution of this question (ACM 4200, Lindahl, 2 CMR 825, pet den, 3 CMR 150; U.S. v. Burns [No. 847], 2 USCMA 400, 9 CMR 30; CM 349217; Patrick, 7 CMR 278; CM 353051, Downs [Recon.], 5 CMR 295; CM 354045, Puckett, 6 CMR 143; CM 351164, Lyles [Recon.], 6 CMR 440). However, if the issue has been fully

explored and properly litigated at the trial level, there is no requirement that the Board of Review upset the holdings of the court-martial or launch into an independent investigation (U.S. v. Burns, *supra*; see also ACM 1254, McKinney [BR], 1 CMR [AF] 625).

As pointed out in our preceding statement of the evidence in this case, the testimony of the expert witnesses as to the sanity of the accused is in sharp conflict. Captain Heisler and Captain Edelsohn, the former a psychiatrist and the latter a psychologist, testified that, based on extensive examination and observation of the accused, they determined that she was, at the time of the commission of the alleged offense, incapable of distinguishing right from wrong and, further, that she was incapable of adhering to the right. Both of these witnesses were firm in their opinion that the accused suffered a definite mental psychotic condition, amounting to legal insanity. On the other hand, Lieutenant Colonel Martin, Captain Graves and Major Troy expressed the opinion that, although the accused suffered some degree of mental impairment, she was nevertheless sane, with legal standards. These witnesses diagnosed the accused's mental condition as a dissociative reaction. Thus, we are confronted with a situation where expert witnesses, trained in a highly technical field, in varying degrees, express opinions wholly in disagreement upon a given subject. But is not uncommon for psychiatrists to testify wholly in disagreement upon a given point. Judicial cognizance has been taken of this fact. As was observed by Associate Justice Arnold of the United States Court of Appeals for the District of Columbia in *Holloway v. United States*, 148 F2d 665, cert den 334 US 852, 92 L ed 1774, 68 S Ct 1507:

"And so it is that when psychiatrists attempt on the witness stand to reconcile the therapeutic standards of their own art with the moral judgment of the criminal law they become confused. Thus it is common to find groups of distinguished scientists of the mind testifying on both sides and in all di-

reactions with positiveness and conviction. This is not because they are unreliable or because those who testify on one side are more skillful or learned than those who testify on the other. It is rather because to the psychiatrist mental cases are a series of imperceptible gradations from the mild psychopath to the extreme psychotic, whereas criminal law allows for no gradations. It requires a final decisive moral judgment of the culpability of the accused. For the purposes of conviction there is no twilight zone between abnormality and insanity. An offender is wholly sane or wholly insane." (See also CM 365415, Burton, — CMR —.)

From the voluminous evidence of record on the question of sanity of accused at the time of the offense, the court was required to accept or reject such part or all thereof as it saw fit, in its determination of this vital issue. The legal test of sanity as applied in military law is set forth in paragraph 120b, Manual for Courts-Martial, United States, 1951, and insofar as here pertinent provides:

" * * * A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from mental defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease, or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction, malfunction of the mental, as distinguished from the moral faculties. To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. * * * "

It was incumbent upon the court to apply the standards set forth in the above quoted portion of the manual against the evidence before it, expert and lay. The issue was one purely of fact (ACM 2831, Edelbaum [BR], 3, CMR [AF] 560; ACM 2810, Pelate [BR], 4 CMR [AF] 46; ACM 4115, Ward, 2 CMR 688; ACM 5126, McGee, 4 CMR 810; ACM 6114, Procopio, 10 CMR 845). The court was not, however, and likewise the Board of Review is not, bound to accept the testimony of either expert or lay witnesses, nor the opinion of one or more experts in preference to opinions of others (ACM 3253, Diamond [BR], 4 CMR [AF] 370; ACM 5126, McGee, *supra*; ACM 873, Carras [BR], 2 CMR [AF] 133; ACM 5507, Thomas 6 CMR 792; CM 348185, Hofues, 4 CMR 356; Holloway v. US, *supra*; US v. Harriman, 4 F Supp. 186; US v. Hill, 62 F2d 1022).

68 This is not to say, of course, that either a court-martial or the Board of Review should disregard *pro forma* the testimony of any given class or group of witnesses, be they experts possessed of technical professional qualifications, or mere laymen. Having accepted the standard of mental responsibility as defined in the Manual for Courts-Martial, however, we must give due consideration to the ramifications and interpretations of such a standard. In so doing sound reason, justice and fairness dictate that due consideration be accorded advances in medical science, including those in the field of mental competency. The accused's sanity, however, is a question of fact to be resolved by the triers thereof, based on a consideration of all of the evidence, not the least of which is that of lay witnesses whose views upon the subject of accused's sanity, founded upon intimate daily contacts, are not without probative value. The difficulties, and often injustices, resulting from overemphasis, or lack thereof, accorded a given category of evidence have been long recognized by the courts. In *Davis v. United States*, 160 US 469, 40 L ed 499, 16 S Ct 353, Mr. Justice Harlan in speaking for the court, made the following observations:

"It seems to us that undue stress is placed in some of the cases upon the fact that * * * the defense of insanity is frequently resorted to and is sustained by the evidence of ingenious experts whose theories are difficult to be met and overcome. Thus, it is said, crimes of the most atrocious character often go unpunished, and the public safety is thereby endangered. But the possibility of such results must always attend any system devised to ascertain and punish crime, and ought not to induce the courts to depart from principles fundamental in criminal law, and the recognition and enforcement of which are demanded by every consideration of humanity and justice. No man should be deprived of his life under the forms of law unless the jurors who try him are able, upon their consciences, to say that the evidence before them, by whomsoever adduced, is sufficient to show beyond a reasonable doubt the existence of every fact necessary to constitute the crime charged."

In ACM 873, Carras (BR), *supra*, a Board of Review, after an exhaustive review of numerous decisions involving the question
69 of weight and effect to be accorded psychiatric testimony in criminal prosecutions, stated its views as follows:

* * * Although we should always give careful consideration to the opinions of men trained in the field of neuropsychiatry, and accept the view that a person may be suffering from mental disease because of a *functional* disturbance or disorder, as distinguished from an *organic* or *structural* impairment of

the brain itself, we should not supplant the finding of the forum—the court-martial—before which accused received his ‘day in court’ by the office of the psychiatrist, his report of examination, or his testimony at the trial. It has often been said that ‘no man can look into the heart or mind of another’, but that the existence of intent, malice, etc., are peculiarly within the province of the triers of the fact, inferable from the surrounding facts in evidence; and it is believed that the existence of mental responsibility may be determined in a like manner by the same forum. And, when we can reach the abiding conviction that the members of the court-martial were able in the case at hand, ‘upon their *consciences*, to say that the evidence before them, by whomever adduced, is sufficient to show beyond a reasonable doubt the existence of’ mental responsibility, the findings of the court-martial on this issue should not be disturbed on review.” (Italics in original)

More recently an Air Force Board of Review in ACM 6114, Procopio, *supra*, wrote on this subject as follows:

“The testimony in the present case clearly placed in issue the sanity of the accused at the time of some of the alleged offenses. With respect to the determination of such an issue, the Board of Review in *United States v. McGee* (ACM 5126, 4 CMR ~~810~~, 818) stated:

“The cardinal question before the Court was whether accused was insane at the time of the commission of the offenses charged. This issue was one of fact (Pelate, *supra*; ACM 2831, Edelbaum (BR), 3 CMR (AF) 560; ACM 4115, Ward, 2 CMR 688 and cases cited therein). The court was not bound to accept the opinion of one or more of the 70 experts in preference to the opinions of others (ACM-3253, Diamond (BR), 4 CMR (AF) 370); in fact, a court is not bound to accept the opinion of any expert if other evidence is more persuasive and common sense conclusions dictate otherwise (*Holloway v. U. S.*, 148 F. 2d 665; *U. S. v. Hill*, 62 F.2d 1022; *U. S. v. Harriman*, 4 Fed. Sup. 186).

“The court in this case obviously had no reasonable doubt as to accused’s sanity for implicit in the findings of guilty is the determination that the accused was mentally responsible for the acts charged (Pelate, *supra*; Diamond, *supra*; ACM-2721, Driggers (BR), 3 CMR (AF) 513).”

“In addition to the authorities above cited, other decisions also hold that neither the court-martial nor the Board of Review is required to accept the opinion testimony of any one of the experts as binding or conclusive on the question of

sanity, but should independently determine the issue of sanity to its satisfaction (ACM 873, Carras (BR), 2 CMR (AF) 133, 161; ACM 4200, Linda, supra)."

Another quotation from the opinion in *Holloway v. United States*, supra, appears particularly apropos at this point:

"A complete reconciliation between the medical tests of insanity and the moral tests of criminal responsibility is impossible. The purposes are different; the assumptions behind the two standards are different. For that reason the principal function of a psychiatrist who testifies on the mental state of an abnormal offender is to inform the jury of the character of his mental disease. The psychiatrist's moral judgment reached on the basis of his observations is relevant. But it cannot bind the jury except within broad limits. To command respect criminal law must not offend against the common belief that men who talk rationally are in most cases morally responsible for what they do.

71 "The institution which applies our inherited ideas of moral responsibility to individuals prosecuted for crime is a jury of ordinary men. These men must be told that in order to convict they should have no reasonable doubt of the defendant's sanity. After they have declared by their verdict that they have no such doubt their judgment should not be disturbed on the ground it is contrary to expert psychiatric opinion. Psychiatry offers us no standard for measuring the validity of the jury's moral judgment as to culpability. To justify a reversal circumstances must be such that the verdict shocks the conscience of the court." (See also *United States v. Gundelfinger*, 102 F Supp 177).

From the above authorities, it appears well settled in military and civil law that testimony of expert witnesses is generally subject to the same qualifications and limitations as the testimony of any other witnesses. Courts may accept or reject it; the testimony of one witness may be given greater weight than that of another; or the testimony of the expert may be wholly disregarded by the court in favor of more persuasive evidence elicited from a lay witness. While the Board of Review may judge the credibility of witnesses and determine controverted questions of fact, we must not lose sight of the fact that the court members saw and heard the witnesses, and had a far better opportunity to form an opinion as to the merits of the evidence than does the Board of Review. We cannot say, on the basis of this record, that the court-martial erred in giving greater weight to the testimony of the expert witness for the prosecution, if in fact this be the case, than was accorded to that of

those who testified on behalf of the accused (US v. Biesak [No. 2676], 3 USCMA 714, 14 CMR 132, 12 Feb. 54; US v. Johnson [No. 2588], 3 USCMA 725, 14 CMR 143, 12 Feb. 54). We might observe that it appears only logical and proper that this did occur. While at least one witness for the defense, Captain Heisler, possessed the qualifications of a psychiatrist, on the opposite side we have the testimony of three psychiatrists, all of whom were at least equally, if not better, qualified in this field, by reason of their academic and professional training and experience. Normally, we would accord greater weight to the testimony of the best qualified "expert", all other things being equal (ACM 873, Carras, *supra*).

72 It should not be overlooked that Captain Edelsohn, while a qualified psychologist, possessed no recognized qualifications in psychiatry, other than his own assertion that a person "cannot operate as a clinical psychologist without knowing the full field of psychiatry" (R. 288).

In our consideration of these assigned errors, we have not greatly stressed the testimony of several lay witnesses who testified before the court-martial. It is significant to note, however, that these witnesses, most of whom were neighbors and friends of accused and the deceased, were unanimous in their opinions that the accused was a calm person, not readily excitable, and one whose only real concern was for her home and children. Not one testified that the accused was in any sense abnormal. Certainly there is nothing in this evidence that is contrary to, or in any manner reflects adversely on the court's findings. On the contrary, this evidence is entirely consistent with a determination that the accused was sane. While there is some evidence that accused possessed suicidal tendencies, and that on at least one occasion sometime before the act, she had attempted suicide, and also immediately thereafter, this evidence was before the court, was vigorously and repeatedly pressed by the defense, and we have no reason to believe that the court-martial did not give proper consideration to this evidence in arriving at its findings (US v. Biesak, *supra*; US v. Johnson, *supra*).

In further support of these assigned errors, appellate defense counsel contends that the evidence establishes beyond question that accused acted under an irresistible impulse when she slew her husband. Air Force Manual 160-42, paragraph 5, contains a "very fine discussion" of this subject (see US v. Trede [No. 1803], 2 USCMA 581, 10 CMR 79). Paragraphs 5a and 5b of the May 1953 edition of this manual are substantially the same as contained in the same publication issued in September, 1950, except that the "policeman at the side" test has been replaced by the "expectations of detection and apprehension" standard insofar as pertinent to the defense of irresistible impulse, in subparagraph 5a thereof. The changes occurring in the language in paragraph 5c of the latest

publication have also been attacked by appellate defense counsel and will be subsequently considered by the Board of Review in hearing with that claimed error. The referenced paragraphs of the present manual provide:

73 "a. If the accused knows that the act is wrong, yet

cannot 'adhere to the right' because of some mental disorder, he is *not* mentally responsible. This concept recognizes that if a person, because of mental illness, is wholly deprived of the power of choice or volition, he does not possess the freedom of action essential to criminal responsibility. This presents the medical officer squarely with the thesis of irresistible impulse. It should be applied in any given case for cogent reasons only, and with great discretion, since it lends itself readily to abuse. Any accused can say that, when he committed the assault, theft, or murder, something made him do it, and that he could not restrain himself. The medical officer will view such claim with extreme caution, because of its dangerous potentialities. The 'adhere to the right' or 'irresistible impulse' doctrine is not intended to apply to actions committed while drunk, nor to the furies and frenzies of an ill-tempered man who is free of psychosis. Nor should it be used to exculpate aggressive character or behavior disorders. Actually, the doctrine is but seldom applicable, and its application will be limited to actions committed by persons with sick minds—actions perpetrated because of those sick minds. In general, only two kinds of mental illness can be considered to have features which might have application under this doctrine—psychoneurosis and psychosis. A psychoneurosis is a chronic disease; it is a way of life. The medical officer will be properly skeptical of an allegedly irresistible impulse that was, for the first time in the subject's life, suddenly generated just before the commission of the crime. Before testifying that an accused did the act because of an irresistible psychoneurotic compulsion, the medical officer should be satisfied first, that the act is part of a repeated psychoneurotic pattern; second, that the accused exhibited mounting anxiety or tension which was relieved the theft, arson (or whatever the compulsion was); and third, that the compulsion generated by the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed. It is evident that only very rarely,

if indeed ever, do offenses committed within the framework of a supposed compulsive psychoneurosis satisfy all three criteria, particularly the third. In consequence, for practical purposes, true irresistible impulse of inability to

adhere to the right' occurs only in psychotics. Since its legitimate applicability is extremely limited, the doctrine of irresistible impulse will be seldom invoked.

"b. Irresistible impulses in psychotics usually come about in connection with commanding voices, persuasive visions, or overwhelming delusions which, by their nature (and within the frame of reference of the psychosis), compel the patient to commit the act." (Italics in original)

Again we have the testimony of the psychiatrists in diametrical opposition. On behalf of accused, Captain Heisler maintained that a policeman at the side of the accused would not have deterred her, in fact she would not have even noticed his presence. Likewise, Captain Edelsohn, the psychologist, testified that the presence of the entire American army would not have restrained accused. Against this, Lieutenant Colonel Martin, Captain Graves, and Major Troy steadfastly maintained that the accused did not act under an irresistible impulse. Again it is a question of acceptance or rejection of conflicting testimony before the court. Accused's appellate counsel has vigorously attacked in his written brief, and in oral argument before this Board, the use of the so-called "policeman at the side" test in eliciting the opinions of the expert witnesses. As we have already indicated, this will be the subject of further consideration by the Board of Review, in a later branch of this opinion.

What we have said foregoing concerning the authority of the court, and the Board of Review, to accept or reject the evidence of any one or all of the expert witnesses concerning mental responsibility of accused, applies with equal force here. We cannot say that the court erred in concluding, based on the contested evidence before it, that the accused did not act under an irresistible impulse. There is nothing in the record, nor in the post trial affidavits of several of the witnesses, which would justify the Board of Review in upsetting the court's initial determination of this fact question. It appears to have been fully and properly litigated at the trial level (*US v. Burns, supra*; *ACM 1254, McKinney, supra*).

We should here add that, despite considerable diversity of opinion in civilian jurisdictions as to application of this doctrine of irresistible impulse as a defense in prosecutions for homicides, the law is well settled in the military that the rule does obtain, and may be relied upon by an accused as a complete defense to the crime charged (*US v. Trede, supra*). However, the rule is a strict one. In order to be available as a defense, the irresistible impulse must stem from mental disease or derangement; moral insanity or a retarded mental condition is not enough. In the *Trede* case the United States Court of Military Appeals recog-

nized the stringent features of the rule as applied in the military system in the following language:

"While we realize that the phrase 'irresistible impulse' ordinarily connotes an impulse to commit a criminal act that cannot be resisted because of a mental disease which has destroyed the freedom of will, we likewise realize that experts in the medical field differ in the extent of its coverage. In this instance it appears the witnesses were using it in a manner more inclusive than is generally accepted in the legal field. This is of some importance because those jurisdictions which recognize the defense have been cognizant of the possibility of its misuse and misapplication. In virtually all cases the defense has been scanned closely to avoid that situation, and to circumscribe it within reasonable limits the legal authorities have recognized the defense only when it is shown clearly to be an outgrowth of a diseased mind. It seems reasonably certain that military law has hedged the doctrine in with the same restriction. * * *

While the testimony of two witnesses on behalf of accused would meet this test, three testified to the contrary. In this evidentiary controversy, we believe that the court correctly resolved the issue against the accused, and as already stated, we find nothing within or without the record at this level to cause us to disagree.

We now turn to consideration of the post trial affidavits submitted by Lieutenant Colonel Martin, Captain Graves and Captain Edelson, which affidavits are included in the allied papers accompanying the record of trial. It is the opinion of the Board that it is entirely proper that consideration be given to the effect, if any, of these documents (*US v Burns, supra*).

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In his post trial affidavit dated 10 June 1953, Lieutenant Colonel Martin stated that he believed Air Force Manual 160-42 overly restricted the sanity board in its determination of accused's true mental state. He contended that this publication, because of the strict test prescribed in connection with the irresistible impulse rule, i. e., "presence of a policeman at the side", made it impossible for the sanity board to conclude, other than that the accused was sane at the time of commission of the alleged offense. Had this strict limitation been absent, the (sanity) board could properly have determined that the accused acted under an irresistible impulse. However, within the limitations of the provisions of the manual, accused's mental condition necessarily had to be diagnosed as a dissociative reaction. This is substantially what Lieutenant Colonel Martin testified to before the court-martial as a witness on behalf of the prosecution. In his affidavit, this witness "summed up" his present belief that the accused was on 10 March, temporarily insane.

In the affidavit of Captain Graves, affiant expressed the same opinion concerning the limitations imposed by the provisions of the service manual referred to. However, his disagreement does not apparently challenge the irresistible impulse test which was applied, but rather, is a reassertion of his prior in-court testimony to the effect that there was no evidence of premeditation.

Captain Edelsohn's affidavit is a detailed resumé of the various types of tests he had applied to accused, and his findings as to accused's mental condition based upon such tests. He reiterated his conclusion that the accused was psychotic, specifically, paranoid schizophrenia. This he had already testified to before the court-martial (R. 288, et seq.).

We are unable to find in these post trial affidavits sufficient disagreement in the opinions of affiants, as against their testimony at trial, to substantially impeach their in-court testimony to the extent that any reasonable doubt as to the sanity of the accused has been established. While Lieutenant Colonel Martin had characterized accused's mental condition while testifying before the court as a dissociative reaction, and in his affidavit he describes her mental state as temporary insanity, we are nevertheless of the opinion that his present disagreement with his prior testimony is not sufficient

77 to tip the scales to the extent that a reasonable doubt exists as to accused's sanity. It should be noted that the

post trial assertions of Captains Graves and Edelsohn are not in appreciable disagreement with their prior testimony before the court. Except for the additional opinion of Colonel Martin that the accused was temporarily insane, we find very little in these affidavits other than a re-statement of the in-court testimony of affiants that they are not in agreement with the concepts of mental responsibility as applied in military proceedings. Likewise, we are not overly impressed with the argument that these witnesses were unduly restricted in their findings and testimony before the court by reason of the provisions of the disputed manual. We must not lose sight of the significant fact that the post trial affidavit of Lieutenant Colonel Martin, and likewise that of Captain Graves, attacks the limitations imposed on the *sanity board*—not their testimony before the court. However, the board proceedings were held in March, sometime prior to the alleged manual change, and, accordingly, the test as it then existed was the correct one for the board's consideration. While the assailed provisions of this publication might well have been the subject of a recommended change, mere disagreement by those who are called upon to comply therewith does not lend itself to strong conviction here. Both witnesses were aware of these limitations at the time they testified. Nevertheless, they testified at length on the general field of psychiatry in its relation to mental responsibility, and both, on cross-examination, stated unequivocally that they had not changed their opinions.

since rendering their findings in the board proceedings. It is not without some consequence that the "policeman at the side" test was also the standard relied on by the defense at trial, in an attempt to establish that the accused did commit the fatal act as a result of an irresistible impulse.

The proceedings of the sanity board were not before the court, but rather the evidence of the individual members who appeared and testified in person. The board proceedings, we logically assume, were, as customary, conducted for the purpose of furnishing information to the convening authority to ascertain whether or not accused's mental condition was such as to warrant trial for the alleged acts. Again, the determination of this preliminary question by the board was not determinative of the guilt or innocence of the accused.

78 Nor are we able to agree that the limitations assertedly imposed by the provisions of this manual so restricted the sanity board in its findings that it became the victim of "command influence". It is our understanding that this otherwise objectionable, but infrequent, practice is predicated upon the rule that a convening authority or other superior may not inject a personal, as distinguished from an official, interest in the outcome of judicial or other proceedings (UCMJ, Art. 37; US v. Grow [No. 2050], 3 USCMA 77, 11 CMR 77). Air Force Manual 160-42 was promulgated by authority of the Secretary of the Air Force, in conjunction with the Secretary of the Army. It would indeed be strange if these responsible officials in the structure of the Department of Defense would have a personal interest in the outcome of a sanity board proceedings, even assuming, without conceding, that this publication in any sense restricted the findings of the members of such board. It should be noted that the very first paragraph of this manual (sec. 1, par. 1, p. 1) enjoins the medical witness to familiarize himself thoroughly with the provisions of Chapter XXIV; Manual for Courts-Martial, 1951, relative to the legal concepts of mental responsibility and capacity as therein defined. We find no merit in appellant's contention that the sanity board members were unduly subjected to superior command influence by use of the standards set forth in the publication under attack.

Examination of the testimony of these witnesses discloses beyond question that they were permitted to testify generally concerning the entire field of psychiatry in relation to mental responsibility, far beyond the scope of the Manual. Furthermore, we are not prepared to say that a court-martial, in determining the issue of mental responsibility according to the established and accepted standards of military law, is required to hear, or even should be subjected to, a great deal of testimony of psychiatrists, and those who may be otherwise qualified to express professional opinions but whose opin-

ions are based on a determination by methods other than those acceptable in the military system. Certainly it would have been of no aid to the court to have been exposed to additional voluminous evidence generally on this subject, but against which it would be unable to fit the military test of mental responsibility as defined in the Manual for Courts-Martial, 1951, and the long line of military decisions which have interpreted the extent and scope of these standards. Air Force Manual 160-42 does not prescribe the legal standards or tests of sanity of an accused on trial before

79 a court-martial. Rather this appears to be a guide for expert witnesses to aid them in the interpretation of the legal standards prescribed in the Manual for Courts-Martial. In this connection, see AFM 160-42, par. 1; CM 360857, Smith, *supra*; also 58 American Jurisprudence, Witnesses, section 839.

Appellate counsel for the accused lays great stress on the fact that certain language appearing in paragraph 5 of Air Force Manual 160-42 was changed in certain aspects in the publication of the same title and number issued in May of 1953, three days prior to trial, as a successor to the previous manual issued in September of 1950. In the 1950 manual, the "policeman at the side" test was the criteria applied to determine whether or not the accused acted under an irresistible impulse. The 1953 publication states the test as follows:

"* * * and third, that the compulsion generated by the illness was so strong that the act would have been committed even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed." (par. 5a)

"If the medical officer is satisfied that the accused would *not* have committed the act had the circumstances been such that immediate detection and apprehension was certain, he will not testify that the act occurred as the result of an 'irresistible impulse.' No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible.'" (par. 5c) (Italics in original)

From our comparison of the prior and present provisions of this manual, we are of the opinion that they reflect no substantial change. Both are predicated on a theory of immediate detection and certain apprehension. The fact that the policeman is at the side of the offender or at some distance removed does not substantially alter the standard as in either case, the resistance element is founded upon fear of discovery and punishment. We are unable to agree that the 1953 publication constitutes a rejection

by the services of the prior theory applicable to this defense. Certainly it would require fine interpretation to discern any appreciable difference in this standard, as between the present and former manuals.

We are of the opinion that any limitations which the witnesses felt bound by in testifying before the court-martial, if such in fact they believed to exist, have been fully dissipated by their post trial affidavits. While we are aware that these documents are only before the Board, and were not before the court-martial which convicted the accused, we have given careful consideration to their contents and possible effect on the findings. As we previously pointed out in an early part of this opinion, we, as a Board of Review, are entitled not only to consider all of the evidence presented to the court-martial, and to weigh such evidence and determine controverted issues of fact, but we likewise may, and we have, fully considered the post trial reports of the medical witnesses. We find no basis in the latter for disagreement with the court's findings. We are firmly convinced that the result would have not been otherwise had the contents of these affidavits been presented to the court by the witnesses at the time of trial.

In our view of the evidence, we conclude that the accused, at the time of the alleged offense, suffered a dissociative reaction, exactly as three witnesses for the prosecution testified at the trial. This is not a psychosis, but rather a psychoneurotic disorder. Air Force Regulation 160-13A, Joint Armed Forces Nomenclature and Method of Recording Psychiatric Conditions, 1949, is a publication designed to provide a nomenclature of psychiatric conditions consistent with the concepts of modern psychiatry. Paragraph 5 contains a description of psychoneurotic disorders, and insofar as here pertinent provides as follows:

"5. Psychoneurotic Disorders

"This generic term refers to psychiatric disorders resulting from the exclusion from consciousness (i. e., repression) of powerful emotional charges, usually attached to certain infantile and childhood developmental experiences. Hereditary, constitutional organic situational, and cultural factors are involved, but the extent to which they are contributory to the particular disorder is difficult to determine. However, these factors should be carefully considered in evaluating 'external precipitating stress' and 'premorbid personality and predisposition' (pars. 13 and 14). These repressed emotional charges, which may not be apparent without an extensive and deep investigation of the personality, may or may not be adequately controlled in the absence of external stress. Longitudinal (lifelong) studies of individuals with such disorders usually present evidence of periodic or constant mal-

adjustment of varying degree. Special stress may make the symptomatic expressions of such disorders acute.

"The chief characteristics of these disorders is 'anxiety,' which may be either 'free floating' and unbound ('anxiety reaction'), and directly felt and expressed, or it may be unconsciously and automatically controlled by the utilization of various psychological defense mechanisms (repression, conversion, displacement, etc.). In contrast to psychotics, patients with psychoneurotic disorders do not exhibit gross distortion or falsification of external reality (delusions, hallucinations, illusions) and they do not present gross disorganization of the personality.

"Anxiety in psychoneurotic disorders is a danger signal felt and perceived by the conscious portion of the personality (ego). Its origin may be a threat from within the personality—expressed by super-charged repressed emotions, including particularly such aggressive impulses as hostility and resentment—with or without stimulation from external situations, as loss of love or prestige, or threat of injury. The various ways in which the patient may attempt to handle this anxiety will result in the various types of reactions listed below.

• • • • •

"*b. Dissociative reaction.*—This psychoneurotic reaction represents a type of personality disorganization which proves to be in the majority of instances a neurotic disturbance. The diffuse dissociation seen in some cases of acute combat exhaustion may occasionally appear psychotic, but nearly always the reaction becomes neurotic.

82 "In acute cases of such reaction, the personality (ego) disorganization appears to permit the anxiety to overwhelm and momentarily govern the total individual, resulting in aimless running or 'freezing'. In other cases, the repressed impulse giving rise to the anxiety, may be either discharged or deflected into various symptomatic expressions such as fugue, amnesia, etc. Often this may occur with little or no participation on the part of the conscious personality.

"These reactions should be differentiated from schizoid personality, schizophrenic reactions, and from analogous symptoms in some other types of neurotic reactions. Formerly, this reaction has been often classified as a type of 'conversion hysteria'.

"The diagnosis should specify the symptomatic manifestations of the reaction, such as depersonalization, dissociated personality, supor fugue, amnesia, dream state, somnambulism, etc."

It will not require a restatement of the evidence at this juncture to sufficiently demonstrate that accused's entire history vividly reflects a neurotic state from early childhood. Commencing with the testimony of lay witnesses who appeared before the court—neighbors and friends of accused and deceased—accused's own evidence before the court-martial, and the unanimous opinion of the expert witnesses, it is apparent that accused has suffered more or less throughout her life, in varying degrees, powerful, emotional changes, prolonged periods of nervous anxiety, frustration, and mental disturbances. As pointed out in the last quoted authority, these are usually indicative of certain hereditary constitutional and cultural factors, which are frequently attached to various infantile and childhood developments. As further stated in the above authority, however, the existence of these factors usually results in a dissociative reaction, which, in some types of cases may occasionally appear psychotic, nearly always becomes neurotic. Evidence of the psychiatric witnesses, while not in complete agreement, points to the fact that accused suffered, at the time of the incident, some degree of mental impairment, in her ability to distinguish right from wrong, and to adhere to the right. However, 83 impaired ability to adhere to the right, or distinguish right from wrong, or partial irresponsibility, is not a defense to crime (MCM, 1951, pars. 120, 122; ACM 4616, Brown, 4 CMR 633; ACM 2810, Pelate, *supra*; ACM 2388, Anderson [BR], 3 CMR [AF] 293; ACM 873, Carras, *supra*; CM 351893; Mungo, 3 CMR 325, affirmed in part 11 CMR 18). The impairment to operate as a defense must amount to legal insanity within the standards prescribed by the Manual for Courts-Martial, 1951, paragraph 120, i.e., to constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease or derangement, but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right with respect to the act charged (AFM 160-42, par. 7). The court-martial did not, obviously from its findings, consider the degree of impairment, if any, suffered by accused sufficient to meet this test. We discern no reason from our review of the record of trial to come to a different result with respect to this issue.

We have carefully considered all of the evidence in this voluminous record of trial, and we have attempted to present herein an impartial and complete resumé thereof. We have not overlooked the extensive testimony concerning the accused's mental and physical condition, not only as presented by the witnesses who had studied her lifelong history in this regard, but also all of the evidence concerning her illness, mental state, and actions prior to, at the time of, and following commission of the fatal act.

Nor do we minimize the import of the highly unusual, if not

startling fact, that according to the accused, after administering the fatal blows, she entered the bed of deceased, and apparently remained therein with the corpse throughout the night. This she disclosed to several witnesses on the following day, and in several subsequent interviews. However, bizarre conduct on the part of one who has only recently committed a heinous act is not uncommon (see *The Crown v. James Frank Rivett*, 34 Cr. App. R. 87). Likewise, it appears that accused attempted to take her own life by consumption of a large dosage of barbiturates shortly after she had slain her husband, according to her own testimony in court, and her admissions to other witnesses. But it is not infrequent, common experience demonstrates, that suicide attempts follow commission of serious crimes. Whether this is to seek release in eternal

sleep, or to escape the consequences of an abortive act is
84 something we cannot answer. This will never be known in any case, unless witnesses are forewarned of the intended suicide. In any event, we are unable to attach the significance to these acts, which appellate defense counsel characterizes as "dramatic", as has been urged before this Board on behalf of accused. To label every attempted suicide following commission of an offense as an act of insanity would fly in the face of experience, and we decline to so do.

The record is quite clear that accused was not considered psychotic on 10 March, at the time of her visit to Captain Heisler. At approximately 5:30 in the evening of that date, she appeared normal and rational to her friends. The lethal weapon, significantly, was found in its usual repository on the first floor of the dwelling occupied by accused and deceased, after the dead body was discovered. Accused was able to converse the next day with at least one airman, and she succeeded in taking her children to the nursery. At this point she seemed highly emotional, agitated and distressed. Accused's recounting of the details of the fatal night indicate at least sufficient presence of mind to recall what transpired with considerable clarity. Additionally, the evidence adduced by the prosecution and defense from the numerous expert witnesses, presented to the court, although somewhat in conflict, a thorough evaluation of accused's mental condition. It is not frequent that a case comes before the Board of Review wherein this highly difficult issue is so thoroughly and fairly presented to the court for its initial consideration. Counsel for accused and for the Government were extremely zealous and capable in their presentations. It would be difficult to imagine what more could have been done at the trial level than was done in this case.

From all of the evidence, which we have carefully evaluated, for and against the issue of sanity, we cannot say that there is in the minds of the members of the Board of Review, a reasonable doubt as to accused's sanity (and mental responsibility) at the time of

the commission of the offense (ACM 6114, Procopio, *supra*). The matter, in our opinion, was fully and fairly presented to the court, and properly resolved against the accused. We have discovered no basis for disagreement with the findings of the court-martial in this regard (U.S. v. Burns, *supra*; ACM 8-1254, McKinney, *supra*).

We turn now to accused's third assigned error.

85 Appellate counsel for the accused next contends that the law officer's instructions concerning the applicability of the defense of irresistible impulse erroneously included the "policeman at the side" test. Again, it is urged that by reason of the changes in Air Force Manual 160-42 three days prior to trial, the former test of irresistible impulse set out above had been rejected. Substantially the same argument is advanced in support of this claimed error as was put before the Board in relation to the first two assigned errors. We have already stated in considerable detail our views as to the effect, if any, of the change in the provisions of the service manual referred to. It is unnecessary to re-state our position here.

In order that we may determine the result, if any, of reference to the policeman test as included in the instructions of the law officer, it is proper that we set forth in some detail the entire instruction of the law officer as to the defense urged. It would be injudicious and unfair to consider only isolated portions thereof, without due regard to the complete text of the instructions given. Instructions on the question of sanity, like all other instructions, must be read as a whole (U.S. v. Biesak, *supra*; Matheson v. U.S., 227 U.S. 540, 57 L. ed. 631, 33 S. Ct. 355; Agnew v. U.S., 165 U.S. 36, 41 L. ed. 624, 17 S. Ct. 235; State v. Green, 86 Utah 192, 40 P2d 96†). As to the defense of irresistible impulse, the law officer instructed the court:

"You are further advised that if you have a reasonable doubt as to the mental responsibility of the accused for the offense charged, the accused cannot legally be convicted of that offense. A person is not mentally responsible in a criminal sense for an offense unless he was, at the time of the offense, so far free from mental defect, disease or derangement, as to be able concerning the particular act charged, both to distinguish right from wrong and to adhere to the right. The phrase 'mental defect, disease or derangement' comprehends those irrational states of mind which are the result of deterioration, destruction or malfunction of the mental, as distinguished from the moral, faculties. To constitute lack of mental responsibility, the impairment must not only be the effect of mental defect, disease or derangement, but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged.

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"The ability to distinguish right from wrong as to the act charged is a concrete, not an abstract, concept. The question is, whether the accused knew that the particular act with which she is charged, was wrong in the sense that the military, or society generally, considers the act wrong. The appraisal of the act within the accused's own private ethical system is irrelevant. Even though the accused may have been able to distinguish right from wrong as to the act charged, she is nevertheless not mentally responsible if, because of some mental defect, disease or derangement, she was unable to adhere to the right as to the act charged. An inability to adhere to the right does not exist, unless the act is committed under an irresistible impulse which completely deprives a person of the power of choice or volition. If the accused would not have committed the act had there been a military or civil policeman present, she cannot be said to have acted under an irresistible impulse. A mere defect of character, will power or behavior, as manifested by ungovernable passion or otherwise, does not necessarily indicate a lack of mental responsibility, even though it may demonstrate a diminution or impairment of the ability to adhere to the right as to the act charged.

"The accused initially is presumed to have been sane at the time of the alleged offense. This presumption merely supplies the required proof of mental responsibility and authorizes you to assume the accused's sanity until evidence is presented to the contrary. When, however, as in this case, substantial evidence tending to prove that the accused was insane at the time of the alleged offense is introduced, the sanity of the accused is an essential issue of fact. The burden of proving the sanity of the accused beyond a reasonable doubt, like every other fact necessary to establish the offense charged, is on the prosecution. If, in the light of all the evidence, including that supplied by the presumption of sanity, you have a reasonable doubt as to the mental responsibility of the accused at the time of the alleged offense, you must find the accused not guilty of that offense.

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"The fact that the issue of sanity was resolved against the accused during the trial as an interlocutory matter does not in any preclude you from considering the question of mental responsibility in connection with the findings on the general issue of guilt or innocence." (R. 331-332)

In *United States v. Hatchett* (No. 1137), 2 USCMA 482, 9 CMR 112, the United States Court of Military Appeals had before it for consideration an instruction concerning the matter of reasonable doubt. The law officer, after attempting to define reasonable doubt had added: " * * * In other words, if there is a balance,

you have to resolve the question in favor of the accused. * * * In disposing of appellant's contention that this constituted reversible error, the court used the following language:

"The difficulty with the assignment is that the particular quoted portion of the instruction is torn from a complete charge and at first blush it gives a misleading, confusing and erroneous impression. However, there is a well-understood rule of law, i.e., that instructions must be considered in their entirety and if, when gathered together by their four corners, they state the law properly and with sufficient clarity to be understood by the members of the court-martial, then they are not prejudicial even though one sentence may be technically incorrect. In this connection there were other instructions given by the law officer which influence our determination that, when considered as a whole, the charge could not be interpreted as changing another well known and easily understood rule of law that the Government must prove the accused guilty beyond a reasonable doubt."

Testing the instant instructions by the "well-understood rule of law" referred to in the foregoing opinion of the Court of Military Appeals, we are unable to find wherein the court-martial was either misinformed or inadequately instructed in respect to the defense of irresistible impulse. The objectionable portion of the instructions is but a single sentence included within a comprehensive and otherwise complete and correct statement of the law on this subject, insofar as material here. Indeed, it would take extremely
 88 careful analysis to seize on the statement attacked as being incorrect when viewed with the entire instructions given, and to conclude that the instruction was in fact either misleading or incorrect (*US v Hatchett, supra*). We note that the instruction given in this regard was far more complete than that requested by defense counsel at the trial (see App. Ex 41), although it should be pointed out that the requested instruction did not include the policeman at the side test. But it is not necessary that the law officer instruct in the precise language proposed by counsel, so long as he complies with the substance of the request (*US v Beasley* [No. 2173], 3 USCMA 111, 11 CMR 111; *U.S. v. Offley, et al.* [No. 1841], 3 USCMA 276, 12 CMR 32, affirming CM 355931, *Offley, et al.*, 9 CMR 223). Here defense counsel's request was fully complied with, and it is significant to note that he did not include in his proposed instruction any other standard or test than that given, which was in fact in accordance with the theory of the prosecution and defense throughout the entire trial of the case. Had defense counsel desired, or been aware of, any other theory of criminal immunity to be submitted to the court in the form of

instructions, he should have come forward with them. Considering the instructions given, as a whole, we find no fault with either their completeness or correctness, and accordingly, we conclude that no error prejudicial to the accused resulted from the instruction in the form given (*US v Hatchett, supra*; CM 355119, Anderson, 8 CMR 212).

By the fourth assigned error, it is argued that the law officer improperly curtailed defense cross-examination of expert witnesses in two respects. The first claimed erroneous exclusion of evidence concerns the testimony of Captain Graves. On recross-examination the witness was asked:

"Now, you made some statement earlier about the rules under the military—you were reaching certain conclusions; what would have been your conclusions, Doctor, if you were evaluating this particular patient, with the evidence that was available to you, without the rules that the military laid down?"
R. 265)

An objection to this line of cross-examination on the ground of immateriality was sustained. We discern no error in the law officer's ruling. Initially, the scope of cross-examination is a matter within the sound discretion of the trial judge (*Glasser v. United States*, 315 US 60, 62 S. Ct. 457; *District of Columbia v. Clawans*, 300 US 617, 81 L. ed. 843, 57 S. Ct. 660; *McKnight v. United States*, 122 F. 926; *Alford v. United States*, 282 US 687, 75 L. ed. 624, 51 S. Ct. 218; *US v. Heims* [No. 1497], 3 USCMA 418, 12 CMR 174), albeit the fact that cross-examination on relevant issues pertaining to matters brought out on direct examination is a matter of right (MCM, 1951, par. 149 b; ACM 6071, Dunn, 9 CMR 763). Aside from any consideration of abuse of discretion here by the law officer, we believe that the propriety of his ruling, excluding the evidence sought to be elicited, may be founded on firmer ground. Here the witness had testified to the fact that psychiatric standards might vary between civilian concepts, and as applied in the military system, insofar as recording psychiatric conditions are concerned. As stated specifically by this witness: "In civilian psychiatry, those would be considered a kind of mental illness. In military psychiatry, it is not considered to be an illness, a psychiatric illness" (R. 263). The short answer to appellant's assertion here is that the court-martial was not interested in civilian standards or concepts of psychiatric classification. Military courts are concerned only with the standards of mental responsibility prescribed in the Manual for Courts-Martial, 1951, as promulgated by the President, pursuant to congressional authority contained in Article 36, Uniform Code of Military Justice (PL 506, 81st Cong., c. 169; sec. 1, 64 Stat. 108; Title 50 USC [chap. 22], secs. 551-736; E. O. 10214, 8 Feb. 51). Further evidence sought

to be brought forth by defense counsel as to the witness' opinion as to what certain factors might or might not reflect as to the mental condition of a given patient, by other than applicable military criteria would be immaterial, and would in all probability, add more to confuse than clarify the real issues in the minds of the court members. We conclude that limiting the cross-examination here was entirely proper. We might observe, however, that this record is replete with testimony that different standards do prevail between the civilian and military community in this regard, and exclusion at this point certainly did not leave the record barren of considerable, although unnecessary, evidence on this point (see *US v. Heims, supra*).

In earlier cross-examination of the same witness, defense counsel had brought forth that certain stains found on accused's pajamas (Pros. Ex. 10) had been determined to be fecal material; 90 and further, that one suffering a dissociative reaction might lose sphincteral control (R. 259-262). However, he had further testified that even had this physical reaction occurred, it would ordinarily have no appreciable connection with the severity of the patient's dissociative reaction. On objection, and following argument, the law officer sustained the objection "at this time", for the reason that he apparently considered that the hypothetical question posed did not encompass facts already before the court. Thereupon the court recessed. On reconvening, defense counsel continued cross-examination, without further reference, however, to the subject of fecal material found on the pajamas in question. We are unable to agree that further cross-examination on this subject was unduly limited. The court's ruling was by no means final; indeed, it inferentially included an invitation, or at least a suggestion, that the matter might be pursued further. It is not insignificant that all of the prosecution medical witnesses, who had been subjected to intensive cross-examination, were in agreement that accused did suffer a severe dissociative reaction. Hence, it is difficult to perceive how further evidence along the line indicated would have served to establish a fact which had actually already been settled as much by witnesses for the prosecution as for the defense. Be that as it may, we do not construe the ruling of the law officer as forever foreclosing further cross-examination of this or any other witness on the matter at hand. Certainly not to the extent that he abused his discretion in sustaining the objection for the time being (*Glasser v. United States, supra*; *District of Columbia v. Clawans, supra*; *Alford v. United States, supra*; *Kretschke v. United States*, 313 US 551 85 L. ed. 1515, 61 S. Ct. 835; *McKnight v. United States, supra*; *United States v. Heims, supra*). Assuredly the error complained of, if error there be, would not warrant reversal (see 58 Am. Jur. Witnesses, sec. 673).

We come now to the fifth assigned error raised by appellate

counsel for the accused before this Board. It is here contended that the law officer on two separate occasions failed to instruct the court properly as to the accused's mental state insofar as it may have affected her ability to premeditate. During the course of the trial, the law officer, on at least two occasions, instructed the court members as to the elements of the offense of premeditated murder, and also the lesser included offense of unpremeditated murder (R. 305-307, 330-332). It is urged that the law officer's failure to instruct the court that the accused, by reason of some mental disorder, might be incapable of premeditation results in fatal error.

We have been favored by appellant with a formidable array of authority from state jurisdictions on this question. As pointed out in appellant's brief, several states follow the rule that mental impairment may be sufficient to negate premeditation or deliberation in a case of murder. Conversely, other state jurisdictions hold that mental impairment has no connection with the degree of the crime of which the accused may be found guilty. That is to say, that the accused must either be found guilty of murder or be acquitted. It is unnecessary to enumerate the numerous state jurisdictions on both sides of this question. The most complete collection of cases in favor of and opposed to the accused's theory herein is found in the decision of the Supreme Court of the United States in *Fisher v. United States*, 328 US 463, 90 L. ed. 1382, 66 S. Ct. 1318. In that case, the Supreme Court had for review the decision of the United States Court of Appeals for the District of Columbia in the case bearing the same title (149 F. 2d. 28). There the accused had been convicted of murder. Psychiatric testimony had been introduced in the trial court which would indicate that the accused, by reason of his aggressive tendency and low emotional response, was the type of person likely to conceive and carry into effect a brutal murder. Appellant therein asked that the jury be instructed that, in considering the intent or lack of intent to kill on the part of the defendant, premeditation or no premeditation—deliberation or no deliberation—and whether or not at the time of the fatal act the defendant was of sound memory and discretion, it [the jury] should consider the entire personality of the defendant, including his mental, nervous, emotional and physical characteristics. The requested instruction was denied. In disposing of this claimed error on appeal, the United States Court of Appeals for the District of Columbia, speaking through Associate Justice Arnold, had this to say:

"The instruction confuses the issue of insanity with the question whether the psychopathic characteristics of the appellant prevented him from forming the deliberate intent necessary to constitute first degree murder. For that reason

alone it was properly refused. But even if these issues had been separated there was no evidence justifying an instruction on either of them. So far as insanity is concerned there was no testimony indicating appellant did not know the nature and character of his act or was not conscious of the difference

between right and wrong. With respect to the issue of 92 deliberation the psychiatric testimony went no further than to say that appellant was the kind of person who was apt to conceive and carry into effect a brutal murder of this character because of his psychiatric aggressive tendencies and his low emotional response to situations which would deter ordinary men. But it is obvious that brutal murders are not committed by normal people. To give an instruction like the above is to tell the jury that they are at liberty to acquit one who commits a brutal crime because he has the abnormal tendencies of persons capable of such crimes." (see also CM 360857, Smith, *supra*).

The court quoted with approval from the decision of the same court in *Hart v. United States*, 130 F. 2d 456, 458 as follows:

"The rule suggested by appellant would become a refuge for ill-tempered, irresponsible citizens; it would put a premium upon lack of self-control and would penalize the reasonable man, * * * because of the restraint which he practices in his dealings with his fellows.' *Hart v. United States*, 1942, 76 U.S. App. D.C. 193, 195, 130 F. 2d 456, 458."

We have before us a recent decision of the United States Court of Military Appeals which we believe answers appellant's present contention before this Board. In *United States v. Holman* (No. 2132), 3 USCMA 396, 12 CMR 152, a similar argument was advanced before that tribunal. There it was claimed that the trial court erred in failing to furnish the court with instructions concerning the effect of the disturbed state of the accused's mind in relation to his ability to entertain a specific intent. The court disposed of this contention in the following language:

"We have considered accused's other assignments, and have concluded that they are without merit. The evidence was wholly insufficient to have required an instruction regarding intoxication and its legal effect. With respect to the evidence of sanity, it is clear that it, too, fell far short of showing legal insanity, as was similarly the case in *United States v. Trede*, 2 USCMA 581, 10 CMR 79, decided May 29, 1953. Our opinion in *Trede* provides a sufficient response, and a distinctly negative one, to the assertion of appellate defense counsel that—although

93 the evidence did not tend to establish legal insanity—the law officer was required to instruct the court-martial that its members should consider the disturbed state of the accused's mind, in relation to his ability to entertain a specific intent, to the same extent and on the same theory that instructions might have been demanded had there been abundant evidence of intoxication."

The argument so vigorously pressed before this Board in the instant case was likewise advanced before the Supreme Court of the United States in *Fisher v. United States*, *supra*. In fact, the same theory was relied on, i.e., the effect of mental impairment insofar as the accused's ability to premeditate was concerned. In the *Fisher* case, Mr. Justice Reed, in speaking for the court, had this to say:

"The error claimed by the petitioner is limited to the refusal of one instruction. The jury might not have reached the result it did if the theory of partial responsibility for his acts which the petitioner urges had been submitted. Petitioner sought an instruction from the trial court which would permit the jury to weigh the evidence of his mental deficiencies, which were short of insanity in the legal sense, in determining the fact of and the accused's capacity for premeditation and deliberation. The appellate court approved the refusal upon the alternate ground that an accused is not entitled to an instruction upon petitioner's theory. This has long been the law of the District of Columbia. This is made abundantly clear by *United States v. Lee*, 4 Mackey (DC) 489, 495, 54 Am. Rep. 293. This also was a murder case in which there was evidence of mental defects which did not amount to insanity. An instruction was asked and denied in the language copied in the margin.

"It is suggested that the *Lee* Case was decided when murder under the District law was not divided into degrees and that therefore it was not proper to instruct as to the accused's mental capacity to premeditate and deliberate while now it would be. We do not agree. The separation of the crime of murder into the present two degrees by the code of law for the District of Columbia, March 3, 1901, 31 Stat. 1189, 1321, c.

94 854, is not significant in analyzing the necessity for the proposed submission of the evidence concerning petitioner's mental and emotional characteristics to the jury by specific instruction. The reason for the change, doubtless, lay in the wide range of atrocity with which the crime of murder might be committed so that Congress deemed it desirable to establish grades of punishment. Cf. *Davis v. Utah*, 151 U.S. 262, 267, 270, 38 L. ed. 153, 155, 156, 14 S. Ct. 328. Homicide, at common law, the rules of which were applicable

in the District of Columbia, had degrees. Murder was 'with malice aforethought, either express or implied.' Blackstone, Book IV (Lewis ed., 1902), p. 195; see *Hill v. United States*, 22 App. D.C. 395, 401; *Hamilton v. United States*, 26 App. D.C. 382, 386-391; *Burge v. United States*, 26 App. D.C. 524, 527-530. Manslaughter was unlawful homicide without malice. Blackstone, Book 4, p. 191. As capacity of a defendant to have malice would depend upon the same kind of evidence and instruction which is urged here, it cannot properly be said that the separation of murder into degrees introduced a new situation into the law of the District of Columbia. As shown by the action of the District of Columbia courts in this case and the other District cases cited in this and the preceding paragraph, we think it is the established law in the District that an accused in a criminal trial is not entitled to an instruction based upon evidence of mental weakness, short of legal insanity, which would reduce his crime from first to second degree murder.

Petitioner urges forcefully that mental deficiency which does not show legal irresponsibility should be declared by this Court to be a relevant factor in determining whether an accused is guilty of murder in the first or second degree, upon which an instruction should be given, as requested. It is pointed out that the courts of certain states have adopted this theory. Others have rejected it. It is urged, also, that since evidence of intoxication to a state where one guilty of the crime of murder may not be capable of deliberate premeditation requires in the District of Columbia an instruction to that effect (*McAffee v. United States*, 72 App. D.C. 60, 111 F. 2d 199, 205 l.c.), courts from this must deduce that disease and congenital defects, for which the accused may not be responsible, may also reduce the crime of murder from first to second degree. This Court reversed the Supreme Court of the Territory of Utah for failure to give a partial responsibility charge upon evidence of drunkenness in language which has been said to be broad enough to cover mental deficiency. *Hopt v. Utah*, 104 U.S. 631, 634, 26 L. ed. 873, 874. It should be noted, however, that the Territory of Utah had a statute specifically establishing such a rule.

No one doubts that there are more possible classifications of mentality than the sane and the insane. White, *Insanity and the Criminal Law*, 89. Criminologists and psychologists have weighed the advantages and disadvantages of the adoption of the theory of partial responsibility as a basis of the jury's determination of the degree of crime of which a mentally deficient defendant may be guilty. Congress took a forward step

in defining the degrees of murder so that only those guilty of deliberate and premeditated malice could be convicted of the first degree. It may be that psychiatry has now reached a position of certainty in its diagnosis and prognosis which will induce Congress to enact the rule of responsibility for crime for which petitioner contends. For this Court to force the District of Columbia to adopt such a requirement for criminal trials would involve a fundamental change in the common law theory of responsibility."

At the outset it should be noted that the law officer otherwise fully and properly instructed the court-martial on the elements of the offense of premeditated murder, and the lesser included offense of unpremeditated murder. Additionally, the court was instructed on the element of premeditation (R. 305-307, 330-332).

From the authorities which we have cited above, it appears quite clear to the Board of Review that there is no requirement that the court must, or even should, be instructed on the element of mental capacity insofar as the ability to premeditate is concerned, either in the Federal courts (U.S. v. Fisher, *supra*), or in military courts (U.S. v. Holman, *supra*), for the reason that there is no twilight zone between sanity and insanity. An offender is wholly sane or wholly insane (Holloway v. U.S., *supra*). We have considered the provisions of paragraph 9a of Air Force Manual 160-42, relied on by appellant herein for the proposition that a person may be
96 legally responsible in a criminal sense, but still lacking in sufficient mental capacity to premeditate. We have already indicated our views that this manual does not state the law, and it is binding on neither courts, witnesses, nor the Board of Review. This disposes of appellate defense counsel's fifth assigned error.

By the sixth assigned error we are called upon to make a determination of the correctness of the court's findings that the homicide of which accused was convicted was premeditated.

Murder is the unlawful killing of a human being without justification or excuse (MCM, 1951, par. 197a). Premeditated murder is murder committed after the formation of a specific intent to kill someone, and consideration of the act intended. A murder is not premeditated unless the thought of taking life was consciously conceived and the act or omission by which it was taken was intended. However, it is not necessary that the intention to kill shall have been entertained for any particular or considerable length of time. When a fixed purpose to kill has been deliberately formed, it is immaterial how soon afterwards it is put into execution (MCM, 1951, par. 197d). Appellant places great reliance on the testimony of Lieutenant Colonel Martin to the effect that there was no evidence of premeditation. The testimony of Captain Heisler and Captain Graves was to the same effect. Major Troy, on the other

hand, testified that the accused was mentally capable of formulating an intent to kill and to premeditate. Likewise, Captain Graves, in his post trial affidavit which we have previously referred to on several occasions in this opinion, stated that it does not follow that because a person is not insane that they nevertheless possess the mental capacity to premeditate. He reemphasizes his in-court testimony to the effect that there was no psychiatric evidence which would lead him to believe that there was a sufficient degree of conscious participation in the planning and execution of the act to characterize it as a premeditated crime. Likewise, Captain Edelson, as a witness before the court-martial, and in his post trial affidavit, expressed the opinion that the accused was psychotic. He steadfastly maintained his opinion that the act ~~was~~ was not one of premeditation.

97 The question now confronting the Board of Review is whether it should accept and substitute for the court's findings the in-court and post trial opinions of witnesses concerning a fact question. Initially, we desire to point out that it is quite clear to us that premeditation is a fact question, and it may be inferred from the circumstances attending the killing. Whether or not there has been the required premeditation is a fact for the jury (court-martial) to resolve (U.S. v. McCrary [No. 4], 1 USCMA 1, 1 CMR 1). The trial court is entitled to examine all of the facts of the case and should carefully consider all of the evidence in reaching a finding as to whether or not premeditation existed (U.S. v. Goodman [No. 16], 1 USCMA 170, 2 CMR 76).

This assigned error requires that we reconsider a portion of the evidence pertinent to the element of premeditation. The record reflects that the victim was slain after he had retired and while asleep. The lethal weapon was a hand axe usually kept in a coal bucket on the first floor of the dwelling occupied by accused and her husband. The bedroom occupied by accused on the fatal night was on the second floor of the premises. The hand axe was found in its usual place on the first floor near the fireplace, following the fatal act. The record further reflects that the corpse was covered, and it is quite clear that this was for the purpose of preventing the discovery of the body by the children of the accused. The following day the accused informed Airman Goodwin that the deceased was not at home. We attach considerable significance to the fact that the accused, by her own admissions, used an axe with which to kill her husband and the record leaves no doubt that it was necessary for accused to secure this fatal implement from the first floor of the quarters occupied by the principals, carry it to the second floor bedroom, and after it had served its purpose, to return it to its usual repository. The situation here is not unlike that considered by an Army Board of Review in CM 354898,

O'Brien, 9 CMR 201, affirmed United States v. O'Brien No. 19151, 3 USCMA 105, 11 CMR 105. In its opinion, the United States Court of Military Appeals used the following significant language:

98 " * On the morning in question—and this fact, perhaps, is the most significant of all—he purposely secured a pick mattock in the basement, ascended to a second floor bedroom, and killed his wife with it. * Indeed, there is evidence which argues that his trip to the basement was made with the sole object of arming himself with the tool. In any event, the movement of the pick from basement to bedroom is of grave importance in its bearing on the question of premeditation. Considering the totality of evidence, we cannot say that it did not permit a determination by the court-martial of premeditation on the part of petitioner beyond a reasonable doubt and within the fair operation of reasonable minds. United States v. Shuler (No. 1599), 2 USCMA 611, 10 CMR 109, decided June 4, 1953." (See also U.S. v. Riggins, et al., [No. 1641], 2 USCMA 451, 9 CMR 81; U.S. v. Sechler [No. 1025], 3 USCMA 363, 12 CMR 119; U.S. v. Harvey and Wilson [No. 647], 2 USCMA 248, 8 CMR 48; CM 360857, Smith, *supra*; ACM 2891, Henderson, et al. [BR], 4 CMR [AF] 1051; CM 364221, Corey, 11 CMR 461; CM 352044, Swisher 3 CMR 367)

In view of the foregoing authorities, and our appraisal of the evidence in this case, we find nothing to justify a conclusion other than that the murder was an act of premeditation. With due respect to the opinion of the psychiatrists, we find no basis in law for substitution of their opinions on this purely fact question for that of the court-martial. Accordingly, we are not disposed to set aside the court's determination of this question, which we conclude is fully supported by the evidence, in favor of the in-court and ex parte opinions of the witnesses referred to.

Under its findings, the court-martial could not sentence accused to less than life imprisonment. While we have the power to modify this sentence (UCMJ, Art. 66), we find no basis for reduction of the sentence in this case. Anything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted.

99 For the foregoing reasons, the Board of Review finds the findings of guilty and the sentence correct in law and fact. Article 66(c) having been complied with, the same are hereby

Affirmed.

GORDON O. BERG, (Dissent)
H. L. ALLENSWORTH.

Department of the Air Force
Office of the Judge Advocate General
Washington, D. C.

30 April 1954

AFCJA-23/5

ACM 7031

UNITED STATES

v.

CLARICE B. COVERT, a person accompanying the Armed Forces of the United States without the continental limits of United States and the possessions thereof

DISSENT BY PISCIOTTA, JUDGE ADVOCATE

I dissent from the decision of the majority members of the Board of Review because I do not believe the accused was legally sane at the time of the commission of the offense.

There is no dispute as to the facts that on 10 March 1953 the accused did attack her husband with an axe resulting in his death. In order to better understand my final conclusion as to the accused's sanity, it becomes necessary to outline the life history, background, and events leading to the unfortunate incident.

The accused was an only child and the product of a broken home. When she was born, her father was very much disappointed that she was not a boy. He resented her, showed this resentment during her childhood by treating her as a boy, and made several attempts to dispose of her; on one occasion, attempting to suffocate her by putting a pillow over her head (R. 182, 183). At one time he attempted to throw her mother out of a hotel window and, on another occasion, tried to choke her in the presence of the accused.

Accused, then a child, was terrified at these events (R. 114).

101 Her father was a heavy drinker, gambler, and ne'er-do-well, continuously changing jobs, forging checks and, after several separations, finally deserted his family in 1932 when the accused was twelve years of age. She has not seen her father since. Her mother attributed the father's desertion to the fact that the accused was a girl. Her mother had been left a legacy of \$7,500 by her first husband, which accused's father squandered. He was a cruel man and tormented the accused. Like accused's husband, he forged several checks which her mother had to make good (Def. Ex. F. R. 170). As a child, accused never felt the love and consideration of either parent and felt unwanted, alone, and afraid. Because of their financial difficulties and poor home surroundings, she did not make friends and avoided people (R. 115). After

finishing high school, she left home, went to nursing school, and then worked as a secretary until she met her husband (the victim). He was a second lieutenant of infantry at the time. They were married in March 1943, and two months thereafter he went overseas. While overseas, he got into some financial difficulty, and she had to send him \$629 out of her savings to keep him out of the "stockade" (R. 116). He was released from the service in November 1945, didn't work, but drank and gambled heavily, spending approximately \$5,000 which she had saved while he was away. In March 1946, he enlisted in the Air Force as a master sergeant. While she was pregnant, before her first son was born, he gambled \$450 out of their joint bank account and that was the last of all their savings (R. 117). He wrote several bad checks on banks where he had no account, and accused always had to redeem them to keep him out of jail. Finally, when all her savings had been squandered by his heavy drinking and gambling, she had to cash her insurance policy in order to pay the expenses incident to the birth of her first child. Her husband had no sense of responsibility. All he thought about was wine, whiskey, gambling, and buying cars. In February 1948, he demanded money to redeem a check which he had forged to pay some gambling losses, and, when she refused, he left her and their child. She started divorce proceedings after a few months' separation, but abandoned the divorce action and went back to him because, as she testified, " * * * I couldn't stay away from him. I was a nervous wreck the whole time I was away from him. I couldn't eat; I couldn't sleep; I couldn't even hardly hold my job down." After she returned to him she felt better (R. 118, 119). She thought he would stop his drinking and gambling, but he did not. He continued forging
102 checks and squandering his money on drink and gambling. They could never get ahead. He came home late practically every night. He ignored the children and "certainly didn't think of their future" (R. 76). When he was sent to England in September 1951, she was anxious to be with him, and when he was transferred from Ruislip to Upper Heyford, she was so anxious to be with her husband that even one room in a hotel would have been sufficient (R. 119, 167, 175, 195). While in England, she was advised that all of their household goods which had been in storage in the States, burned. They had no insurance to protect this loss, and this worried her (R. 199, 230). She worried about her children's health. The youngest had asthma, and, although old enough to talk, he didn't say a word (R. 89, 101, 119, 161, 177).

In December 1952 she was advised that her aunt (her father's sister) had died and left her a legacy of almost \$50,000. Her husband began to make plans on how to spend it. He planned to buy a new car, make a trip around Europe, a trip home, and to buy

clothes. She did not want to spend it, but wanted to put it in a trust fund for the children's education and for a home when her husband retired. The difference in plans did not cause friction or disagreement between them, but worried her and was the beginning of her illness. She had considered leaving him, but just couldn't do it. She had tried before, but couldn't be without him (R. 97, 120).

In February she became very ill. She felt as if she were dying, felt as if she were passing out, and just couldn't go on. Finally, she got so desperate that she went to the infirmary to see a doctor (R. 120). Captain Cogar gave her a bottle of phenobarbitol, but the medicine did not do her any good; she couldn't sleep nor eat, and she was getting progressively worse. The doctor thought she had a toxic goiter and arranged for her admission to the hospital. She was then hospitalized at the 5th Group General Hospital at Borden Park from 25 February to 3 March 1953. Clinical examination failed to disclose anything organically wrong with her (R. 121). She was given sixteen blue sleeping tablets and took them regularly. On Saturday night, March 7, she took four tablets. She couldn't explain why. She didn't know whether they would kill her or not. The next day she kept thinking of morbid things out of her past. She had been told by her mother that when she was born she was not expected to live and that her father's parents had picked out a coffin for her. They did not want her to live. She thought

103 about her father trying to push her mother out of a hotel window and about her father trying to smother her when she was a child. These and other things that happened in her childhood and what she had been told by her mother, all of which she had no reason to think about at this time, flashed in her mind "like pictures on a screen" (R. 122, 123, 130). She became so desperate she got up from the dinner table and ran to the dispensary to see a doctor (R. 122). She saw Doctor Cogar on Monday, March 9, and wanted to get back into the hospital. She felt there was something wrong with her, that she had to go that night, and, if they didn't take her, she was going to "explode." He gave her some more tablets and tried to get her admitted to the hospital, but could not (R. 123). That night, Monday the 9th, she took two tablets, and on the 10th, the fatal night of the incident, she took about fifteen; all she could find (R. 124):

It is not intended to disparage the memory of the accused's husband, the victim of the unfortunate incident, but in order to better understand the tormented, anxious, and worried life that accused led which eventually drove her irresistibly to the commission of the fatal acts, we will review the testimony of witnesses pertaining to the accused's habits and character. His commanding officer, other officers who supervised his work, and men who worked and were acquainted with him, testified that he was very childish in

his ways, his judgment was not commensurate with his position and rank, and it became necessary to transfer him from job to job because of his inefficiency and incapability for the jobs he was holding (R. 135, 138, 152, 165, 166). At times he appeared to have been drinking heavily the night before (R. 139). Complaints were made against him for failure to pay his debts and for uttering bad checks in the States and in England (R. 144, 147, 149, 152). He seemed to be "a kid that never grew up" (R. 145). The deceased was a habitually heavy drinker and gambler, had a mania for slot machines (R. 89, 143, 149, 153, 168), and, when broke, would borrow to continue playing (R. 150). He was quite obnoxious when drinking (R. 102). While stationed in Arizona, without his wife's knowledge, he depleted their checking account by drawing a check for \$400 to pay a gambling debt. One of the sergeants in his organization had \$200 in bad checks given to him by the deceased for gambling debts (R. 168).

Mrs. Covert started to complain about her health to her neighbors around Christmas of 1952 (R. 101). She was very nervous and could not sleep and was continuously getting worse (R. 104, 101, 160). When spoken to and during conversations, she would constantly look at the floor (R. 92). She was very much concerned over her children's health and inquired whether the authorities would send her home. When told her husband could not go back with her, she wouldn't go without him (R. 89, 101, 161). They were quiet neighbors, and no one ever heard them argue or fight (R. 161, 166, 167, 174). Outwardly, they appeared to be friendly, calling each other endearing names (R. 97). Accused was considered by her neighbors as a good wife and mother and was highly respected by everyone who knew her (Def. Ex. D, R. 168). Her husband's heavy drinking upset her (R. 89), and she was concerned about again being hospitalized. She worried that something might happen to her children while she was away because her husband got drunk. She considered sending for his parents to go to England to take care of her children (R. 91, 179).

Captain Cogar saw the accused for the first time on 16 February 1953. At that time, he gave her sedatives. She returned on the 19th, but showed no signs of improvement. On these visits, she appeared to be agitated and extremely upset, her pulse and blood pressure were appreciably elevated above normal. She had a definite tremor of her fingers and hands on both occasions. At first he thought her severe nervous upset was probably a hyperthyroid condition. He arranged for her to be admitted to the 5th Hospital Group at Burderop Park for a complete medical evaluation. She was released from the hospital on 3 March when found she had no organic illness and that her entire illness was based on a nervous condition. Captain Cogar again saw accused on March 9 at the

base infirmary at RAF Station, Upper Heyford (R. 236). At that time, "she was even more upset and emotionally disturbed" than on her previous visits. She was not improved to any degree (R. 237). He felt she was becoming rapidly worse and decided she should have psychiatric treatment, including hospitalization as soon as possible. He spent approximately one hour with her. She stated she felt as though "something was going to let go" (R. 238). He contacted Captain Troy (now major), but, due to the fact that no facilities were available at Burderop Park, he gave her sedatives and arranged for her to see Captain Heisler, the psychiatrist.

Captain Heisler, a psychiatrist stationed at the 5th Hospital Group at Burderop Park, England, testified he first saw the accused at about 2 o'clock on 10 March 1953. He interviewed her for

about one and one-half hours, more than normal, because
105 of her symptoms of severe anxiety, agitation, and depression.

The accused constantly stared at the floor and engaged in no spontaneous activity except chain smoking during the entire interview. She had stated to him that for the past three months she had felt very ill, had no interest in normal activities, had great difficulty sleeping in spite of medication, and possessed a constant vague feeling of uneasiness and anxiety for which she could not account. This latter emotion started sometime after she heard of her aunt's death, and, although at first elated over the news of her inheritance, after a few days she became upset and started to worry about it. She had planned to get their own home and felt the money would "guarantee" her children's education. Her plans centered entirely around her children's welfare. After a few days, she began to feel anxious and worried that perhaps her father might appear and claim the money. Although somewhat assured by the Base Legal Officer that it was not possible to break the will (R. 182, 231), this irrational fear that her father would interfere constantly worried her more and more. She started to develop "a feeling of fullness, a sort of a ball-in-the-throat sensation, which is a characteristic anxiety symptom." The accused felt uncomfortable in crowds and refused invitations; even to small gatherings or to play bingo. All of these things she normally did before (R. 182). She was reliving her childhood over again "particularly in relation to her father"; things she had not been thinking about for a long time. The accused was a very insecure individual, quite emotionally upset, and evidenced "some very—fairly well marked suicidal ideas that she had had for some time past." This was just a week after she had been discharged from the hospital on March 3 (R. 183).

The accused appeared so distressed that Captain Heisler decided to see her again the next day, an unusual practice as he only saw

his out-patients once or twice a week. Captain Cogar was very much concerned about her, and the day before had called Major Troy who informed him that the wards were full, and there was no space available to accept her as a patient. Captain Heisler saw her at the request of Captain Cogar and spoke to accused's husband that afternoon advising him that it was important for the doctor to see her again the next day. The accused had a tremendous amount of difficulty and tended to hold back discussing details of her early life, especially her early relationship with her parents (R. 184). She had been assured after her hospitalization at Búrderop that she had no physical ailment. However, the symptoms not only continued, but actually got worse, and
106 primarily the suicidal feelings became more pronounced.

There was an increase in her agitation, anxiety, and sleeplessness. She didn't "know where these things come from—sort of vague realization that there was no obvious basis for them, not being able to understand herself why she was so troubled and upset. * * * she had been given a prescription for I think 15 capsules of sodium amýtal, 3 grains apiece, which is easily adequate to enable a normal person to sleep for at least eight hours." She had taken four one night and, despite such a heavy dose, awakened relatively early and had a great deal of difficulty sleeping. That was an indication of her extreme agitation and preoccupation (R. 185).

At first Captain Heisler considered hospitalizing her, but due to lack of room in the psychiatric ward and her solicitation for her two small children, he did not. He also considered that there was an appreciable suicidal risk (R. 185); however, besides the lack of space at the hospital, he felt that her husband, being on leave at the time, would be able to exercise a certain amount of caution and supervision and look after her.

At about 5 o'clock the night of the fatal incident (Mar. 10) the accused was visiting her neighbor, Mrs. Scamordella, when her husband came for her. Mrs. Scamordella asked accused to go to bingo with her, and deceased told the accused to go. However, the accused stated she would rather stay home with her husband and watch the television. She invited Mrs. Scamordella to visit her and watch the TV with them (R. 53, 91). The deceased proceeded to bed. There had been no argument, no quarrel, or any other unpleasant incident between the accused and her husband.

Captain Heisler saw her again the next day, March 11, at about 2 o'clock. At that time she appeared quite different from the day before. Her hair was uncombed, she looked somewhat disheveled, and was obviously distressed. Although she had been prompt the day before, she was late on this occasion. When he asked her "How are you? * * * She looked exceedingly depressed and down-

cast and gazed almost constantly at the floor, with no outward show of emotion whatever" (R. 186), answered in "just a completely dull monotone: 'I killed Eddie last night.'" It struck him:

"* * * at the time as so odd in its delivery and so detached from the normal expression of emotion that I had two
107 thoughts immediately: that possibly she had had an acute mental breakdown and that the whole thing was fabricatorily made up, or delusional material of some sort—that is, untrue; or that possibly something had happened. * * *

"* * * she was exceedingly depressed; it was a very profound depression, one in which she exhibited no normal movement, * * * no normal expression, no normal feeling in her voice; constantly stared at the floor; appeared somewhat confused as to the exact sequence of events, of exact times, partially being unaware of the surroundings, * * * she had gone into a psychotic depressive reaction." (R. 187, 188)

When the 31st Article was read to her by Lieutenant Smith, "she was totally incapable of understanding the meaning of this at that time. She was obviously still so detached from normal sense of reality that * * *, she was "certainly incapable of recognizing the importance of the 31st Article being read to her" and incapable of being interviewed (R. 189, 214).

Lieutenant Smith, the Staff Judge Advocate of the Group, read the 31st Article of the Uniform Code of Military Justice to the accused on the afternoon of March 11. He "was of the opinion that such advice was not being comprehended" (R. 232).

The accused had stated to Captain Heisler the afternoon of the 11th that "I guess I hated him like I hated my father" (R. 67, 187). The previous day she had expressed a feeling of hostility towards her father for the rejection she had experienced from him all her life, his cruel treatment of her, and for having abandoned her when she was 12 years of age (R. 187). She had her own sense of guilt because her mother had attributed her father's desertion to her being a girl instead of a boy (R. 190).

It is important to note the parallel of the events and facts in her earlier life and those of her married life. Her husband, like her father, turned out to be a heavy gambler, drinker, and forger and utterer of bad checks, constantly in financial difficulties because of his heavy gambling and drinking. Her father had shown her no love or affection; her husband neglected and did not seem
108 interested in the welfare or future of her two boys. Like her father, her husband showed complete lack of interest in working towards any form of real security. Her father

squandered her mother's inheritance from her first husband, and the accused's husband squandered her savings in gambling losses and heavy drinking. Her father finally deserted them, and her husband had left her and their son because she would not pay off his gambling losses. It was she who was compelled to resume their relationship because she couldn't go on without him. For every incident in her early life an exact parallel is found in her married life with the deceased, "so that in many ways, from a psychological standpoint, the way the patient [accused] felt about her husband shared some of the intense feelings that she had had about her father" (R. 250). There were numerous examples of the type of stress that she was under during her marriage, all of which "is important in only one respect, and that is, it terribly undermined her feeling of security" (R. 191).

These facts and circumstances are not recited to justify the commission of murder, but merely emphasize and explain the extreme anxiety, depression, and emotional upset that was slowly and surely driving this unfortunate woman insane. She was not the type to fight these things back, to argue these matters out, and, although from time to time reluctantly and only when looking for an answer, a cause, or a cure for her depressive feelings, did she talk about her difficulties to her neighbors, she shared this intolerable tormented feeling inwardly. As Captain Cogar testified, although *she appeared superficially quite calm and under control, it was not difficult to discern within a few moments that she was in a state of severe inner tension and emotional conflict*" (R. 239) (Emphasis supplied). She did not explode. She was a very meek, retiring, calm, quiet person who never argued nor had a fight with her husband. Although her husband was not physically cruel or abusive to her, his heavy drinking, gambling, and irresponsibility, his retiring into a world of his own, paying no attention to his children, ignoring them, rejecting them, as she had been rejected by her father, constituted that mental torture that eventually gave vent and released the pent-up emotional tension that came to a head the night of the fatal act (R. 280).

Captain Heisler best describes this in the following testimony:

"* * * over a long period the stress was sufficient so that on several occasions she had wanted to leave him, but because of her own dependency needs, which are very strong
109 in an individual who has never had normal security, emotional security, she found herself completely unable to leave him, and that of course accounts for the development of a very strong feeling of ambivalence—that is, both of love and of dislike for a loved object, * * * (R. 195)

This feeling of hate and love is entirely unconscious, and despite her resentment about the way he treated her children, his excessive drinking and gambling, "she was completely unable—not unwilling, but absolutely unable—to voluntarily leave or get out of the situation" (R. 195).

If she had been able to face the reality of the situation she would have done what a normal person under these circumstances would have done, obtained a divorce and left him. With her aunt's bequest of almost \$50,000, she could have gone back home with her two children. Many times she expressed a desire to do so. She had tried it once, but became more miserable and suffered more away from him and had to return.

Contrary to the majority's conclusions, the accused was not able to give details of the events of the night of the incident. Major Furst, the Office of Special Investigations agent, who interviewed the accused on the 16th, six days after the incident, testified "she was vague about the actual incidents." The most detailed statement which she made to him was that "He was asleep, and I was ready for bed." When asked if she used an axe, she answered "Yes," but her recollection of the other events was vague. She did not know why she committed the act. However, she was able to discuss her relationship with her husband since their marriage, relating many events, giving dates and places. She further stated he drank and gambled excessively (R. 74, 75), and mentioned his becoming involved in the forging of some checks which she had to make good (R. 76). As to the events leading to her husband's death, she was vague. Nevertheless, she was a very willing witness and volunteered most of the information. Major Furst and the other interviewers felt that the accused was being truthful and was making a full and complete disclosure to them. They were impressed by her sincerity and straightforwardness to the best of her recollection (R. 77).

Captain Heisler testified that the accused did not remember the details of the night of the 10th. A great number of things he asked she was unable to state, and, in spite of extensive
110 interviews, was still unable to recall. She was not sure of the time, but only guessed what it might have been. Many of the incidents she remembered were those events related to her usual habits and not because she specifically remembered them (R. 215). Even to the date of trial, she could not and had difficulty trying to clearly answer some questions put to her.

At the trial, four psychiatrists and a psychologist personally testified, and the testimony of Captain Cogar, an Army medical officer, was obtained by deposition (Def. Ex. I, R. 236, 237). The entire question, legally, as to whether the accused was mentally respon-

sible for the commission of the offense, centers around the testimony of these medical witnesses.

Captain Graves, one of the Sanity Board members, testified that *he was bound by Air Force Manual 160-42, Psychiatry in Military Law*, in his determinations that the accused was, at the time of the commission of the offense, able "to distinguish, right from wrong" and "able to adhere to the right" (R. 242), "with reservations about the premeditation" (R. 243). The acts of the accused were not the result of *irresistible impulse as that term is defined by paragraph 5c of the Air Force Manual*, namely, "that the accused would have committed the act *even if there had been a policeman at her elbow*." " * * * with that definition in mind," he came to the conclusion "that if a policeman were present, or someone else were present, she would have refrained from the act" (R. 243) (Emphasis supplied).

Captain Graves further testified "that under this severe emotional stress, her abilities to know right from wrong and to adhere to the right were impaired, but they were not completely abrogated", and again he based this conclusion on the Manual's definition that "*If there had been a policeman there*, for instance, this could not have come about—I mean, she would have been jolted out of it" (R. 251) (Emphasis supplied). However, he did testify that he did not feel that the act was premeditated "the thing was impulsively conceived and impulsively executed, without planning, without thinking" (R. 257). He saw the accused briefly the night of March 13, but did not interview her until the next morning and again "on three or four occasions subsequently for as much as half hour, 45 minutes, or an hour perhaps" (R. 245). Based upon these brief visits and the report of Captain Heisler, who up to that time had interviewed the accused on only two occasions, the 10th and 11th of March, he prepared the first draft of the Sanity Board's report on April 23 (R. 246, 248).

111 Lieutenant Colonel Martin, Chief of Professional Services, 5th Hospital Group and consultant to the Surgeon, United States Air Forces in Europe, a psychiatrist, served as president of the Sanity Board. He spent approximately a total of six to eight hours interviewing the accused with the idea of evaluating her (R. 268). He first saw her on the night of the 11th of March. Although she answered rationally, it was "somewhat automatically, because she was in a rather dazed condition at that time." The next morning, the 12th, the accused asked him why she was there (at the hospital at Burderop Park) and what had happened. " * * * she repeated the question frequently enough that I had to tell her what my understanding of the alleged offense was. * * * " It was a normal expression of real anxiety and the wondering what had happened (R. 269). He further testified that he was *bound by the definitions in Air Force Manual 160-42. Based upon the standards*

laid down in that Manual, the act of the accused was not irresistible impulse as defined therein (R. 275). The accused was able to distinguish between right and wrong and "was able to adhere to the right within—but with qualifications" (R. 267). There was "severe impairment of the ability to adhere to the right" (R. 275), but "Sticking strictly to that manual, I must say that she was" mentally responsible in a criminal sense for the act which she committed. On March 10, the night of the commission of the offense, the accused had a malfunction of the mental function (R. 276) (see par. 120b, MCM, 1951, p. 200).

Although Lieutenant Colonel Martin testified that *sticking strictly to the Manual* he had to say she was legally sane, he testified:

"I feel quite strongly that the right or wrong did not enter into her thinking at all, did not influence her thinking, her behavior. . . . that part that has to do with right and wrong did not operate sufficiently to make right or wrong—make any difference to her.

" . . . that the mechanisms were not able to control the unacceptable, the unconscious urges, the unconscious drives." (R. 273)

He reasserted his opinion, expressed in the report of the Sanitary Board, that:

"There is no evidence of premeditation or of prior consideration of the act. It is clear that the decision to perform the alleged offense was hastily arrived at and impulsively carried out, without prior consideration or planning." (R. 274)

112. The Sanitary Board in its analysis and evaluation in the Air Force Manual 160-42 (R. 275).

Major Troy, the third member of the Sanitary Board, testified that *under the standards laid down in Air Force Manual 160-42*, and the definitions therein, the acts committed by the accused on the fatal night were not the result of irresistible impulse and, *if there had been a policeman at her side*, the accused would not have committed the act (R. 278). Major Troy had originally seen the accused the day she was discharged from the hospital at Burderop, on March 3. He next saw her after the unfortunate incident, and spent approximately a total of three to three and a half hours personally interviewing her (R. 279). He testified that:

" . . . On the night of the offense, this extreme tension and mixed-up feelings, depression, . . . sort of came to a head,

almost overwhelmingly, to the point that she, * * * operated almost in an automatic or dazed manner. I think that her judgment, that her actions of that time, were carried on in this sort of dazed, automatic-like manner; * * * (R. 280)

Captain Edelsohn, a psychologist, testified that he is chief of the clinical psychology section of the neuropsychiatric service at the 5th Hospital Group, Burderop Park. He has had 16 to 17 years experience in applied field of psychology. Within 36 hours after the fatal act, he began giving the accused a series of psychological tests. He started on Thursday, March 12, for several hours in the afternoon and evening and several days thereafter (R. 287). He gave her all the important standard tests, namely, the Wechsler-Bellevue, Bender-Gestalt, HTP, Mackover, TAT, Cornell index, Minnesota Multiphasic, and the Rohrschach tests. He subsequently retested her again about April 23. He came to the conclusion as a result of all these tests that the accused's mental responsibility was extremely limited at the time of the commission of the offense, and his diagnosis of the accused's condition was that of parapsychizophrenia. This "is considered a psychotic state" (R. 288, 290). He was "convinced that the presence of a policeman would not have resisted her, any more than the United States Army present in the hospital would have resisted her" (R. 290).

113 Captain Heisler had only seen the accused for about one and a half hours on the 10th and about one hour after the fatal incident when he submitted his report to Lieutenant Colonel Martin, president of the Sanity Board. Therefore, his report submitted to and considered by members of the Sanity Board was limited to his observations and examination of the accused on these two occasions (R. 292). However, after his return to the 5th General Hospital at Burderop Park, from temporary duty he again saw the accused on 28 March 1953. That was after the Sanity Board had submitted its report (dated 23 Mar. 53).

During this subsequent period, he spent approximately 40 hours with the accused, and thus learned of other details and incidents about her. As a result of this more extensive and exhaustive examination of the accused, he came to the conclusion "that she had gone into a psychotic depressive reaction" (R. 188, 198, 207, 292), and he didn't think that "if a policeman had been standing near her" "would have made any difference, short of physical restraint. * * * she would not even have noticed the policeman" (R. 207, 208). The accused remained profoundly depressed for some weeks after the act itself. For this primary reason, Captain Heisler started to see her at some length, and on frequent intervals. These symptoms persisted for at least a month. " * * * she was considered sufficiently depressed by I believe all members of the

staff there to the point at which we felt suicide precautions were necessary" (R. 295).

The majority opinion of the Board of Review states that "testimony of the expert witnesses as to the sanity of the accused is in sharp conflict." That may appear to be true because of the rule or standard by which the prosecution witnesses felt they were bound. Captain Heisler, who had spent over 42 hours in interviewing, examining, and studying the accused over a period of several months, and who had spent about one and a half hours with the accused on the same afternoon of the unfortunate incident and immediately the next day thereafter, stated that, in his opinion, the accused suffered a definite mental psychotic condition, unable to distinguish between right and wrong, incapable of adhering to the right, not mentally responsible for her acts, and legally insane (R. 188, 189, 207, 208, 214). Captain Edelson, the psychologist, with 16 to 17 years of experience, perhaps the most experienced in the matter of mental diseases than any of the other witnesses, and who had given the accused all the important, standard, recognized tests in such matters,

114 testified that he arrived at the same conclusion. The importance and value of these tests and the functions of a psychologist (Edelson) were testified to by Major Troy, a prosecution psychiatrist, to the effect that:

"The clinical psychologist serves in what we often speak of as the psychiatric team, the team usually consisting of the doctor, nurse, psychologist, social worker. Perhaps the best description of the psychologist's role in that team might be equated to that of the *laboratory man*. The psychologist's job is to give primarily—his primary job, let's say, in the psychiatric team, is psychological testing, which is an attempt to *evaluate* an individual through as well objectified tests as possible to make them. That information is added to the individual's record and considered, just as a blood count on [sic] an x-ray—whatever it might be—is considered in making the diagnosis." (R. 283) (Emphasis supplied)

Lieutenant Colonel Martin, Major Troy, and Captain Graves, all members of the Sanity Board, were of the opinion that the accused's mental condition was a dissociative reaction, that based upon the definition, standard, or rule laid down by Air Force Manual 160-42 (policeman at the side test), "with that definition in mind" (R. 248) and "Sticking strictly to that manual" (R. 276), her acts were not the result of irresistible impulse, she could distinguish between right and wrong, adhere to the right, and, although suffering from some severe impairment of the ability to adhere to the right, legally sane and responsible for her acts. However, with the exception of Major Troy, they agreed that the act was not premeditated, was

impulsively conceived, and impulsively executed without planning or thinking (R. 257, 274).

The members of the Sanity Board had made but brief examination of the accused and had not seen her immediately after the commission of the act. Their examinations were for a shorter span of time and on far fewer occasions than Captain Heisler's, who had seen her immediately before and after the incident. They did not have the great many facts that came out in later interviews. Captain Heisler saw her daily after the 23rd of March and continuously attended her (R. 294). The only information he had given the members of the board was a four page report based on his two interviews on the 10th and 11th. The accused remained 115 profoundly depressed for some weeks after the act. That was one of the reasons Captain Heisler saw the accused at some length and at frequent intervals in an attempt to help her over that phase of the depression. That indicated to him that many symptoms actually persisted for some period of time. The neurotic depression, deepening into a psychotic, still persisted even some weeks or even months after the psychotic episode passed off (R. 295). Lieutenant Colonel Martin testified that "actually, during the first week more time spent by the three of discussing this case than there was actually spent by any one of us with the patient, * * ." (R. 271).

We must note that, although Captain Heisler spent approximately forty hours examining the accused, and Captain Edelson performed an exhaustive series of tests and subsequently retested her, Lieutenant Colonel Martin spent "approximately 6 to 8 hours of actual interview with the idea of evaluating the patient" (R. 268); Captain Graves only on three or four occasions for periods of a half hour to an hour (R. 246); and Major Troy approximately only three to three and a half hours (R. 279).

The science of psychiatry, like that of medicine, is not a military matter and cannot be controlled by military rules. The science of mental diseases has made great strides in the past decade, and psychiatry since World War II more than ever is recognized in the medical and legal profession as being important and reliable. Despite the mid-Victorian suspicion, bias, and prejudice of some members of the judiciary and the bar, the military included, it is becoming a more reliable and exact science. Every municipality, state and the Federal Government in their hospitals, in the administration of justice, and penal institutions in the civilian and in the military, have come to recognize it more and more. The medical profession as a whole depends upon it.

The evaluation of a mental patient cannot be made by a cursory examination, nor by interviews of three to four hours. A proper diagnosis cannot and should not be attempted unless a great deal of time is spent in constant observation, interviews, and study for

weeks or months, if necessary, and the longer the period, the more accurate the conclusions become (AFM 160-42, par. 20d, p. 25, 1953 Ed?). Perhaps facilities did not permit more study of the accused by some members of the sanity board, but surely the
116 accused, charged with so serious a crime as *premeditated murder* for which the *death penalty* could have been adjudged, and where the accused was condemned to imprisonment for her natural life, should have had a more thorough and extensive examination than if she had been charged with a mere absence without leave, disobedience of an order, or petty larceny.

We must also not lose sight of the fact that all the medical witnesses were officers in the United States Air Force on active duty. That is, all are in the employ, as such officers, of the Government. Three of them, Lieutenant Colonel Martin, Major Troy, and Captain Graves were members of the Sanity Board, appointed by the convening authority to look into the question of the accused's sanity prior to trial, pursuant to paragraph 121 of the Manual for Courts-Martial, United States, 1951, and paragraph 19b, Air Force Manual 160-42.

Captain Cogar was the medical officer on duty with the United States Army at Upper Heyford Base Infirmary. Captain Heisler was a psychiatrist at the 5th Hospital Group at Burderop Park, England, and Captain Edelson was chief of the clinical psychology section of the neuropsychiatric service at the same hospital. Although Edelson is not a psychiatrist, he has had sixteen to seventeen years experience in the field of psychiatry. The majority, in their opinion, I do not believe intended to imply that he may have been the least qualified. From practical experience, we know that in some fields, and this is one of them, a psychologist with sixteen or seventeen years experience is a great deal better and more qualified in the field of psychiatry than one who, after graduating from medical school not too many years ago, finds himself within a very short period in the service as a psychiatrist, with never an opportunity to practice his profession on his own responsibility. I believe that Captain Edelson, because of his training and many long years of experience and for the amount of time (40 hrs.) he spent with the accused giving her every major test known was as well qualified, and his testimony of as great a weight if not more so than some of the prosecution witnesses. Concededly, all are qualified, some perhaps with more experience than others. None of them were civilian doctors, privately retained by the accused to testify for the defense on her behalf. So there can be no suspicion that their testimony could in any way be colored or biased on behalf of the accused.

117 We, therefore, must conclude that the basis for the opinions of the Government witness who testified that the acts of the accused were not the result of an "irresistible impulse" and

that, therefore, she was able to adhere to the right, were predicated on the definition, which they felt they were bound to follow, contained in Air Force Manual 160-42, namely, the "policeman at the side" test. Thus, the provisions of the Air Force Manual, and particularly paragraphs 5a and c, becomes of vital importance in the final determination of the question of accused's sanity. This provision in the Manual, dated September 1950, and as a basis upon which the witnesses so testified, provided:

"5. Irresistible Impulse (The 'adhere to the right' Doctrine)

"a. If the accused knows that the act is wrong, yet cannot 'adhere to the right' because of some mental disorder, he is *not* (Italicized in original) mentally responsible. This concept recognizes that if a person, because of mental illness, is wholly deprived of the power of choice or of volition, he does not possess the freedom of action essential to criminal responsibility. This presents the medical officer squarely with the thesis of *irresistible impulse*. * * * that the compulsion generated by the illness was so strong that the act would have been committed *even though a policeman had been at the accused's side* at the time the opportunity to commit the offense presented itself. * * *

"c. If the medical officer is satisfied that the accused would *not* (Italicized in original) have committed the act had there been a *civil or military policeman at his elbow, he will not testify* that the act occurred as the result of an 'irresistible impulse'." (Emphasis supplied)

The trial counsel throughout the presentation of the prosecution's case stressed the "policeman at the side" theory and propounded that test in his questions to all prosecution witnesses. That was always the final question upon which he summarized the testimony of his medical witnesses. For example:

118 "Q. Now, in the light of the evaluation you made at the time the board met, in the light of the additional information received by you from Doctor Heister, and what you have learned since, until the day of this trial; is it your opinion that Mrs. Covert was, on the 10th of March, 1953, mentally responsible in a criminal sense, as defined by Air Force Manual 160-42?

"A. Yes.

TC: The prosecution has no further question of this witness.

(Graves, R. 264)

"Q. Under the standards laid down in Air Force Manual 160-42, as you interpret them, is it your opinion, at this moment, that the accused was, at the time of the offense, mentally responsible in a criminal sense for the act which she committed?"

"A. Sticking strictly to that manual, I must say that she was. I do not know anything about the law further than that manual.

"TC: The prosecution has no further questions. (Martin, R. 275, 276)

"Q. Are you familiar with the provisions and standards laid down of mental responsibility in Air Force Manual 160-42?"

"A. Pretty well.

"Under the standards laid down in that manual and the definitions therein, do you consider that at the time she committed the act on 10 March 1953, she did so as the result of an irresistible impulse, as therein defined?"

"A. No; I do not believe it was an irresistible impulse.

"Q. You believe she would have committed the act had there been a policeman at her side?"

"A. No; I do not believe she would have.

"TC: The prosecution has no further questions." (Troy, R. 278) (Emphasis supplied)

119 The court took judicial notice of Air Force Manual 160-42 entitled Psychiatry in Military Law, and trial counsel specifically invited the court's attention to "paragraphs 3, 4 and 5, entitled Standard of Mental Responsibility, Knowledge that the Act was Wrong, and Irresistible Impulse in particular" in which the *policeman at the side* theory is contained (R. 285). (Emphasis supplied).

The law officer in his instructions to the court gave them this erroneous, discarded, and obsolete rule to follow in their deliberations:

" * * * An inability to adhere to the right does not exist unless the act is committed under an *irresistible impulse* which completely deprives a person of the power of choice or volition. If the accused would not have committed the act *had there been a military or civil policeman present*, she cannot be said to have acted under an irresistible impulse. * * * " (Emphasis supplied) (R. 331)

The Manual for Courts-Martial, United States, 1951, provides:

" * * * A person is not mentally responsible in a criminal sense for an offense unless he was, at the time, so far free from men-

tal defect, disease, or derangement as to be able concerning the particular act charged both to distinguish right from wrong and to adhere to the right. * * * " (par. 120b, p. 200) (Emphasis supplied)

Thus the Manual for Courts-Martial provides that in order to be available as a defense, the irresistible impulse must stem from mental disease or derangement.

Lieutenant Colonel Martin, the principal prosecution psychiatrist, and Captain Heisler both testified that the accused, on the night she committed the act, had a *malfunction of the mental faculties* (R. 211, 276), and, therefore, was suffering from a mental defect. Thus, according to these psychiatrists, the accused, at the time of the unfortunate incident was not free from mental defect, but was suffering from a malfunction of the mental faculties.

* * * The phrase 'mental defect, disease, or derangement' comprehends those *irrational states of mind* which are the result of deterioration, destruction, or *malfunction of the mental*, as distinguished from the moral, faculties.

To constitute lack of mental responsibility, the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. * * * " (MCM, 1951; *supra*) (Emphasis supplied)

Therefore, the important questions for the court to determine in arriving at its conclusion that the accused was legally responsible for her acts are: Was the accused, at the time of the alleged offense so far free from mental defect, disease, or derangement as to be able, concerning the particular acts charged, to distinguish right from wrong, and was the accused at the time of the alleged offense *able to adhere to the right?*

How is the court to determine as to whether the accused was "able to adhere to the right?" If the act was the result of an irresistible impulse, she was not able to adhere to the right. However, if the act was not the result of an irresistible impulse, she could have adhered to the right and was, therefore, legally sane and guilty of the offense charged. So we have the hundreds of pages of testimony boiled down to just that simple question. The test they were urged by trial counsel to follow, stressed by him in his final question to each prosecution witness, urged in his closing argument, and given final approval and acquiesced in by the law officer in his instructions to the members of the court, was:

* * * If the accused would not have committed the act had there been a *military or civil policeman present*, she cannot be

of the accused was not the result of irresistible impulse. Now he says remove the restriction, and he could explain her condition as "irresistible impulse."

130 Captain Graves says that "the members of the Sanity Board were, of necessity, governed in making their decisions by the provisions of Air Force Manual 460-42" and that "It has been difficult" for him and, he assumed, the other members of the Board "to clearly express" their feelings "about this case within the framework of this Air Force Manual" and as a psychiatrist he "had no choice but to find this individual sane" (Emphasis supplied).

I do not believe these officers in their affidavits restricted themselves to the Sanity Board proceedings, but did refer to their testimony in court. Lieutenant Colonel Martin stated that:

"... Since there may have been legal technicalities which prevented my testifying in detail as to my understanding of the case, I desire at this time to set forth my views in more detail." (Emphasis supplied)

Captain Graves stated in his affidavit that: "I feel that in some essential sense the meaning of the medical testimony as given by myself (and presumably by other members of the Sanity Board)" (referring to Martin and Troy, both of whom also testified in open court) "was not sufficiently clear to the members of the court * * *"

What more could they have said than that their testimony at the trial was not correct, was influenced by an erroneous, discarded theory, and that if not so restricted, their conclusions would have been otherwise?

Neither the prosecution witnesses nor any participant at the trial was aware at the time that a change had been made wherein the "policeman at the side" rule had been changed and was no longer the rule to be followed. The defense was compelled to rely on that standard, not by choice, but because defense counsel was prevented in following any other theory. When he attempted to question Captain Graves as to his personal professional opinion as a medical expert; he was prevented from doing so. The following colloquy occurred during Captain Graves' cross-examination by defense counsel:

"Q. Now, you made some statement earlier about the rules under the military—you were reaching certain conclusions; what would have been your conclusions Doctor, if you were evaluating this particular patient, with the evidence that
131 was available to you, without the rules that the military laid down?

"TC: I object to the question. It is immaterial what the doctor's opinion would have been in a civilian court. This is

a military court and, as much, [sic] subject to the *rules and standards* laid down for military courts and those *laid down by the Air Force*.

"DC: I must remind the trial counsel and present to the law officer that it has been our contention all throughout the case that we do not have a member of the military on trial, that we have a private citizen of the United States on trial, and that in some respects, with the questions of evidence, we must be subject to the rules of evidence applicable in a federal court." (R. 265) (Emphasis supplied).

Trial counsel countered with the observation that the trial was proceeding "under the rules of the Manual for Courts-Martial, 1951, and in this particular instance under the *rules laid down in Air Force Manual 160-42*." (Emphasis supplied) and that it was immaterial "what the rules are in all the other 48 states" and "in the federal courts." The law officer apparently concurring in this view, sustained the objection of the prosecution (R. 265). Captain Graves was not permitted to express what his professional expert opinion would have been as a result of his long years of schooling, training, and practical experience as a psychologist, but was bound, restricted, and compelled to testify as directed and dictated to him by the definitions and standards set forth by the Air Force Manual 160-42. This very crucial test, upon which hinged the life and liberty of this accused, whether she could distinguish right from wrong and adhere to the right, measured by the so-called "police-man at the side" test, significantly enough had been, at the very date of the trial, abrogated, repealed, discarded, and overruled by the Army and the Air Force and is no longer the definition, the rule, or the standard of the services.

The restraint under which Captain Graves was compelled to testify, not as to his own personal professional opinion but one dictated by the definition and standard laid down by the Manual, is best illustrated by his testimony:

132 "But, according to the regulations that are set down for us to determine what is legally insane or what is legally sane, I have no choice but to say that this was a neurotic reaction. . . . and we have no other alternative but to say that there was enough of her usual self present to know what it was all about at the time it happened and, as I understand what the board was required to do, was to make just that kind of decision; and in this case I don't think it is an easy decision;" (R. 257) (Emphasis supplied)

It must have bothered their consciences to be compelled to testify and make such a decision contrary to their honest opinion as men

of the medical profession. That compulsion did not make their decision an "easy" one, and they did so because they felt they were "required to do" so and make "that kind of decision" contrary to their understanding and belief. Conscience stricken at the result, they made affidavits of their own volition because of an indignant realization that it was "*a clear cut miscarriage of justice.*" (Emphasis supplied.)

Therefore, the majority are in error when they say:

"* * * Nevertheless, they [Martin and Graves] testified at length on the general field of psychiatry in its relation to mental responsibility, * * *"

They both testified in court and restated in their affidavits that as far as the crucial question of whether the accused was able to adhere to the right, acted as a result of an irresistible impulse, and, therefore, was legally sane, was based upon the limitation, the restriction placed upon them by the provisions of the Air Force Manual establishing the standard "policeman at the side" rule. The ruling of the law officer prevented Captain Graves from testifying any further in "the general field of psychiatry."

Contrary to the majority opinion, I am convinced that the results of the trial would have been otherwise if the medical experts had been permitted to testify unhampered and unrestricted by a standard which the services, by their action, have disregarded and changed. The change was not made as a mere grammatical correction, but was substantial and does more closely follow the civilian standards. I am further prepared to say that an expert witness of any character, medical or otherwise, if allowed and qualified to testify at all, should be permitted to do so, free

133 to give his professional opinion for whatever it may be worth, unhampered and unrestricted, as long as material and relevant to the issues. If an expert is to be restricted, then he is no longer giving his expert opinion, and the court, in justice and fairness to an accused charged with so serious a crime as premeditated murder, where her very life was at stake, should be and is required to hear, and, yes, be subjected to all the medical, professional, expert testimony the accused could muster on her behalf. The erroneous restrictions thus imposed upon the medical officers, effectively handicapped the court in the determining of the issue of accused's insanity (ACM 1583, Berry [BR], 1 CMR [AF] 607, 611).

It was the intent of Congress that the system of military justice be administered as nearly and as closely as possible so that a man in uniform may be given the same degree of fair play and justice as his brother in civilian clothes, considering the military mission and the maintenance of discipline (see U.S. v. Clay [No. 49],

1 USCMA 74, 1 CMR 74; U. S. v. Gilbertson [No. 318], 1 USCMA 465, 4 CMR 57; U.S. v. Berry [No. 69], 1 USCMA 235, 2 CMR 141; U.S. v. Keith [No. 503], 1 USCMA 493, 4 CMR 85; U.S. v. Ginn [No. 263], 1 USCMA 453, 4 CMR 45; ACM S-6781, Bruneau, 12 CMR 718.

In the case of Mrs. Covert, a civilian, who became amenable to court-martial only because of having accompanied a member of the military service overseas, we do not have a problem of military discipline. Military courts-martial are bound by the Federal law and rules of practice consistent with the provisions of the Code.

It is a sad commentary on military justice for us to hold that Mrs. Covert, a civilian, is to be adjudged legally sane and responsible for her acts because of an erroneous, unsound, abandoned rule of military psychiatry, while if tried by a civilian court (except for her status as accompanying her husband overseas) would have been adjudged by civilian standards as insane and legally not responsible. That is contrary to the intent of Congress in adopting the Uniform Code of Military Justice.

Air Force Manual 160-42 is not military law, and no one should have been bound by it, but, as far as the witnesses were concerned, it was the law, the standard upon which they had to testify, and they felt bound by it. It was not considered by anyone at the trial

as a mere "guide for expert witnesses to aid them in the interpretation of legal standards," but, as the trial counsel so successfully impressed the court and the law officer instructed the members of the court, it was the definition, the yardstick, the standard, the basis, the rule and, to them, the military law which they were instructed to follow and apply.

It is true that instructions of the law officer are to be read as a whole. However, the final summation of all that he said is laid down in the final test for them to apply and that is, "If the accused would not have committed the act had there been a *military or civil policeman present, she cannot* be said to have acted under an *irresistible impulse*."

Coupled with all the testimony punctuating this one test, we cannot say that it was not the predicate upon which the findings of the court were bottomed. Although just a single sentence, it was a mighty important one.

Neither the Uniform Code of Military Justice nor the Manual for Courts-Martial prescribes "the policeman at the side" theory as a standard, definition, or test for "irresistible impulse," and, in the absence of any such provisions in these two documents which prescribe what the military law is, the provisions of the Air Force Manual should not have been placed before the court as the military rule, criteria, standard, definition, or law. The expert witnesses

should not have been restricted in their testimony to this theory and to do so was most prejudicial to the substantial rights of the accused. We do not know nor can we speculate what the findings of the court would have been had not this erroneous rule been applied and the medical experts permitted to testify as such, unbridled and unfettered by the restriction placed on their testimony.

The majority opinion contends that there was "no requirement that the court must, or even should, be instructed on the element of mental capacity insofar as the ability to premeditate is concerned, * * *, for the reason that there is no twilight zone between sanity and insanity." They conclude that "An offender is wholly sane or wholly insane." They based their opinion on the cases of *Fisher v. United States*, 328 U.S. 463, 90 L. ed. 1382, 66 S. Ct. 1318 and *Holloway v. United States*, 148 F. 2d 665.

135 The United States Court of Military Appeals in *United States v. Higgins* (No. 3145), 4 USCMA 143, 15 CMR 143, stated that:

"As part of a general discussion of the problem of amnesia—as distinguished from intoxication—we think it necessary to observe that amnesia, plus *other evidence* (Italicized in original) of mental shortcomings, may require an instruction not only on insanity, but also on the possibility of *partial criminal responsibility*. In other words, we would consider that the existence of mental processes, such as intent or premeditation, necessary for conviction of certain crimes, may be negated by a showing that the accused's mind could not entertain those processes." (Emphasis supplied)

The court noted that they were not unmindful of the United States Supreme Court's ruling in the *Fisher* case, *supra*, but construed the court's opinion in that case as a construction of the law of the District of Columbia at that time by which the majority felt bound. However, in an early intoxication case (*Hopt v. People*, 104 U.S. 631, 634, [1882]; 26 L. Ed. 873), the Supreme Court had held it error to refuse an instruction that intoxication might be considered as affecting premeditation in a murder trial. In that opinion the Court had stated:

"* * * But when a statute establishing different degrees of murder requires deliberate premeditation in order to constitute murder in the first degree, the question, whether the accused is in such a condition of mind, by reason of drunkenness or otherwise, as to be capable of deliberate premeditation, necessarily becomes a material subject of consideration by the jury. * * *" (Emphasis supplied)

The Court of Military Appeals further stated in the Higgins case, *supra*, that:

"In *Fisher v. United States*, *supra*, the majority distinguished the prior pronouncement in *Hopt* by pointing out that it stemmed from a specific statute. Since that statute is closely approximated by the directive provisions of the Manual for Courts-Martial, United States, 1951, paragraph 154a(2), 136 no such distinction is available to us. Moreover, if an accused person may lessen his criminal responsibility by a showing that he was not able to entertain premeditation, intent or knowledge due to voluntary intoxication—a condition largely within his own control, * * *—we would regard as anomalous a refusal to permit a showing that premeditation, intent, or knowledge was or might be wanting due to some mental derangement—usually without the accused's control. It would seem to follow that if an accused person produces evidence of an underlying mental state, which might have served to affect his intent at the time of the acts alleged, then the law officer should advise the court that its members may properly consider the evidence of mental condition in determining the accused's capacity to entertain premeditation, intent, or knowledge—when any of these is relevant to an offense charged. * * *

The Manual for Courts-Martial provides that although voluntary drunkenness not amounting to legal insanity is not an excuse for the commission of a crime, nevertheless "such drunkenness may be considered as affecting mental capacity to entertain a specific intent, or to premeditate a design to kill, when either matter is a necessary element of the offense" (par. 154a[2]; *U.S. v. Roman* [No. 191], 1 USCMA 244, 2 CMR 150; *U.S. v. Mitchell* [No. 904], 2 USCMA 200, 2 CMR 77).

If we are willing to recognize this reasoning in the case of intoxication, it is just as logical to apply the principle in any situation where for any reason an accused is, in fact, incapable of forming or entertaining the state of mind requisite to the crime charged. And the "otherwise" in the *Hopt* case has been construed to include the question of insanity.

Paragraph 9a of Air Force Manual 160-42 recognizes mental impairment and partial responsibility in the crime of murder:

"* * * the accused by reason of some mental disorder, might be incapable of the required premeditation, though, capable of having intent to kill or inflict great bodily harm (par. 197, MCM, 1951). Thus, the medical officer does not discharge his full duty when he reports on the sanity of the accused in

said to have acted under an irresistible impulse." (R. 331)
(Emphasis supplied)

The "policeman at the side" was the *only* and most important test given to the members of the court as a basis, a standard, a guide, a rule, to follow in their most important decisions as to whether the accused was guilty or not guilty. ~~To my mind it is of the greatest importance and the grux of the whole case.~~ The court was told that such was the military law; the law all witnesses had to follow and were bound by.

Captain Graves was not permitted to express his professional opinion as an expert, derived from his training, study, and practical experience. We, therefore, do not have the unbiased
121 unadulterated honest opinion of a medical expert as to the accused's mental responsibility, but only a picture dictated by the standard laid down by the Air Force Manual. The accused was thus deprived of the fair, impartial trial to which she was entitled under the provisions of the Code Lieutenant Colonel Martin and Major Troy felt they were also bound by that mandate and restriction. The introduction to the manual in its first paragraph contains the following:

"1. General

"This manual defines and explains the *legal standards applied in military law* to determine whether a person was mentally responsible at the time of an offense and has the requisite mental capacity to be tried by court martial. * * * " (AFM 160-42, the same in the 1950 and 1953 issues) (Emphasis supplied)

And the mandate or dictatorial provision of the manual which so impressed the prosecution witnesses that they said "I have no choice", "Sticking strictly" to the manual, is contained in paragraph 5c which states:

"* * * he [the medical officer] *will not testify* that the act occurred as the result of an 'irresistible impulse.' * * * " (Emphasis supplied)

And the irony of it all was that they were all wrong. The trial counsel, law officers, and all the medical experts did not know nor were they aware that at the very time of the trial the strict rule of the "policeman at the side" had been changed, repealed, abrogated, discarded by the Armed Forces as unsound, and that, in fact, it was no longer the rule to be followed. Trial was held on the 25th to the 29th day of May 1953.

On 22 May 1953, the provisions of paragraph 5a of the Air Force

Manual were revised, and a more lenient, more logical rule was adopted. It now provides as follows:

"* * * that the compulsion generated by the illness was so strong that the act would have been committed *even though the circumstances were such that the accused could expect to be detected and apprehended forthwith when the offense was committed.* * * *" (Emphasis supplied)

122 It is true that a court-martial is not bound to accept the opinion of one or more of the experts in preference to the opinion of others (ACM 3253, Diamond [BR]; 4 CMR [AF] 370; ACM 5126, McGee, 4 CMR 810; ACM 873, Carras [BR], *supra*; and many others) and is not bound to accept the opinion of experts if other evidence is more persuasive (Holloway v. United States, 148 F. 2d 665; United States v. Hill, 62 F. 2d 1022). However, where the evidence upon which the court based its finding was erroneously submitted to them for their consideration, and there was no other evidence, not only more persuasive, but none at all, it becomes the duty and obligation of the Board of Review to correct that error. It does not become a question of weighing the testimony of one qualified expert against another, but the question is what would their testimony have been, had they been released from the restraint and compulsion to which the prosecution witnesses felt they were compelled to testify because of their blind adherence to a rule which at that time was no longer in force. The neighbors of the accused did testify that she was a calm person, not readily excitable, and one whose only concern was for her home, her children, and her husband, bad as he may have been, but from whom she could not stay away. But, contrary to the conclusions arrived at by the majority, they did also testify as to her nervousness, her complaining of failure to sleep, her constant worry. Mrs. Scamordella testified that "she was just nervous; that was her main cause", "she was upset over her children" and when discussing things, she would not look at her sort of just talk to her and look to the floor (R. 92). Mrs. Anton testified that the accused became ill at about Christmas time, she had difficulty sleeping and didn't feel well (R. 101) and was quite nervous (R. 102). Mrs. Peel testified the accused complained to her about her health, her nervousness and she couldn't sleep at night. She suggested that the accused go to see a doctor. Accused told her the nervousness was from some kind of thyroid condition, that "she didn't know what she was going to do if she couldn't rest", and "she was getting worse instead of better" (R. 160). Miss Clifton, the kindergarten teacher, saw her the afternoon after the incident. She testified that the accused looked pale, took about five seconds in answering a question put to her, she was staggering, and couldn't find the handle of the

door (R. 164). Mrs. Hartley's testimony was stipulated, that the accused was a rather nervous person, and the condition of the health of her children and her own was a source of worry to her (R. 167).

123 In addition to this testimony, there was evidence of the accused's suicidal tendencies, and that she had, prior to the incident, attempted suicide. The night of the fatal act she took all of the sleeping pills she could find (about 15) and spent the night on a narrow cot in bed with the bloody corpse of her husband. True, the attempts at suicide alone may not be an indication of her insanity, but, considering all these matters and the entire record, one cannot, in good conscience, determine that the accused was not insane. Surely, no normal person, regardless of how hard she might be, would, in her right mind, slip into bed with a horribly mangled and bloody corpse, after having killed him. As Captain Troy, a prosecution witness testified, she "operated almost in an automatic or dazed manner", (R. 280); not knowing what she was doing and unconscious of her surroundings. Those are not the acts of a sane person. This going to bed with her husband after he was dead, established that she was totally devoid of any appreciable sense of reality (R. 208-217, 224, 225).

I have read the cases cited by the majority pertaining to the decisions that the question of insanity is a question of fact for the court to decide. True, but certainly they do not say that the court shall utterly disregard the testimony of medical experts. Some of the decisions indicate still a mid-Victorian suspicion and wariness of psychiatric testimony; that experts do not agree among themselves (neither do lawyers and judges as a matter of fact); and usually testify for the side by which they are hired. Some indicate a distrust for the testimony of experts in mental disease, as unreliable and of little or no value.

Mr. Justice Oliver Wendell Holmes, in a speech at Harvard Law School as far back as 1895, stated:

"An ideal system of law should draw its postulates and its legislative justification from science. As it is now, we rely upon tradition, or vague sentiment, or the fact that we never thought of any other way of doing things as our only warrant for rules which we enforce with as much confidence as if they embodied revealed wisdom. Who here can give reasons of any different kind for believing that half of the criminal law does not do more harm than good?" (California Law Review, Vol. 37, p. 585)

124 Unfortunately the suspicion and distrust of the science of psychiatry and mental diseases is still strong among us. But again I repeat all the medical experts, including Heisler and Edel-

sohn, were Government employed and Air Force officers, testifying as Government witnesses regardless of which side called them to the stand.

In the instant case, the court evidently did not disregard their testimony, but must have paid a great deal of attention to their conclusions.

Mr. Justice Murphy in his dissenting opinion in *Fisher v. United States*, 328 U. S. 463, 66 S. Ct. 1318, 1333, 90 L. ed. 1382, stated:

"* * * When a man's life or liberty is at stake he should be adjudged according to his personal culpability as well as by the objective seriousness of the Crime. * * *

The fundamental concepts of mental functioning of the human being have completely changed in the last few decades. The consequences of this revolutionary change must be recognized and faced in the interest of individual justice as much as for the effective protection of society. We are most prone to highly value the opinions of psychiatrists when they sustain the sanity of an accused, but ridicule and ignore their opinion when it is favorable on his behalf.

Mr. Justice Cardozo, one of the leading jurists of this country, was very outspoken in his criticism of the legal concept of insanity. In his address before the New York Academy of Medicine in November 1928, stated:

"I think the students of the mind should make it clear to the lawmakers that the statute is framed along the lines of a defective and unreal psychology . . .

"More and more we lawyers are awakening to a perception of the truth that what divides and distracts us in the solution of a legal problem is not so much uncertainty about the law as uncertainty about the facts—the facts which generate the law. Let the facts be known as they are and the law will sprout from the seed and turn its branches toward the light . . .

"[It is my belief that] at a day not far remote the teachings of bio-chemists and behaviorists, of psychiatrists and penologists, will transform our whole system of punishment for crime . . ." (CARDOZO, *What Medicine Can Do For Law* in *LAW AND LITERATURE* 70, 100, (1931); *California Law Review*, Vol. 37, p. 576).

125 The court definitely must have felt itself bound by the testimony of the prosecution's medical witnesses and the instructions of the law officer that in the final analysis all the testimony centered upon only one question; that ~~is~~ could she have adhered to the right? Applying the now defunct rule of "the policeman at the side" theory, they could come to no other conclu-

sion than that she could adhere to the right, the act was not the result of irresistible impulse, and, therefore, she was legally sane, responsible for her act, and guilty of the charge. A conclusion derived from a grossly erroneous theory and certainly most prejudicial to the accused.

In considering the question of insanity of an accused, the Board of Review may make an independent determination of that issue and is not restricted to, but may go beyond, the record of trial in order to obtain and evaluate information which will aid in resolving that question (U. S. v. Burns [No. 847], 2 USCMA 400, 9 CMR 30; CM 349217, Patrick, 7 CMR 278; CM 354045, Puckett, 6 CMR 143).

I do not believe that the issue of insanity was correctly and properly explored at the trial level. In view of the erroneous standard by which the issue was compulsorily presented to the court, we cannot say that this issue was properly and fairly litigated at the trial (U. S. v. Burns, *supra*).

After the results of the trial had been announced, Lieutenant Colonel Martin and Captain Graves, both prosecution witnesses, unsolicited by anyone and on their own volition, made affidavits for consideration by the reviewing authorities. Lieutenant Colonel Martin stated:

" * * * I believe few people know more about the case than I do, the findings of the General Court-Martial are *completely wrong*. I can only conclude that the court's findings was either reached without consideration of the medical testimony, or that the medical testimony presented an inadequate picture. * * *

(Emphasis supplied)

Speaking of Air Force Manual 160-42 (1950 issue), he went on to say:

" * * * Air Force Manual 160-42 is far too limited in its scope to include all necessary cases in psychiatry and *hindered* 126 the *Sanity Board* in reaching a finding that adequately expressed the true condition of Mrs. Covert on the night of 10 March 1953. Her case is one which, in my opinion, most psychiatrist[s] would agree would not fall within the scope of this Manual. The manual *makes it impossible* to explain Mrs. Covert's lack of ability to adhere to the right in regard to the particular offense charged as a irresistible [sic] impulse because of one limitation: we could not say that she would have carried out the act if a *civilian authority* had been there. *If that strong limitation had not been present, her condition could be explained as a irresistible [sic] impulse.* * * *

"* * * I believe Mrs. Covert was what I would call 'temporarily insane' on the night of 10 March 1953. * * * The term 'insanity', to me, means that the individual is *not responsible for his or her behavior*. * * * There are a number of mental or emotional reactions not included in Air Force Manual 160-42 which I could classify as a form of insanity from my understanding of the term that would more adequately describe the condition of Mrs. Covert on the night of 10 March without saying that she was psychotic." (Emphasis supplied)

Captain Graves, in his unsolicited affidavit, says as follows:

"* * * the findings of the general court martial *are in error*. I feel that in some essential sense the meaning of the medical testimony as given by myself (and presumably by other members of the Sanity Board) was not sufficiently clear to the members of the court to enable them to reach a verdict consonant with the medical facts in the case.

"* * * the members of the Sanity Board were, *of necessity, governed in making their decisions* by the provisions of Air Force Manual 160-42. *It has been difficult for me, and I assume for other members of the Board, to clearly express our feelings about this case within the framework of this* 127 *Air Force Manual*. According to the provisions of this Manual, I, as a Psychiatrist, *had no choice* but to find this individual sane. * * *" (Emphasis supplied)

These two out of the three prosecution medical expert witnesses expressly state that they were not permitted, because of the mandate and direction that they shall "*not testify*" unless the rule of "*police-man at the side*" is followed, to testify what their personal professional opinion as experts really was. Captain Graves concludes that the finding of the accused guilty of premeditated murder was "*a clear cut miscarriage of justice*."

Captain Edelsohn, at the request of defense counsel, submitted an affidavit in which he explained the results and his analysis of each of the tests he performed upon the accused. He stated that:

"* * * Only where there is a major upheaval as in organic brain damage or in psychosis is there a severe perceptual distortion. The distortion found here was severe and clearly of an order which is regularly classed as psychotic."

Several of his tests showed a finding of psychosis in the accused, and he reiterates his former testimony that his diagnosis of the accused was psychosis; specifically, paranoid schizophrenia. He

spent no less than forty hours work upon the accused. " * * * the diagnosis of paranoid schizophrenia takes into consideration more adequately the narcissistic, seclusive, scizoid, and paranoid features present, which sometimes are more pronounced in testing than in interview."

The Manual for Courts-Martial does provide that:

" * * * Although the testimony of an expert on mental disorders as to his observations and opinion with respect to the mental condition of the accused *may be given greater weight* than that of a lay witness, a lay witness who is acquainted with the accused and who has observed his behavior may testify as to his observations and may also give such opinion * * * " (par. 122c, p. 203) (Emphasis supplied)

However, in the case at bar we have the testimony of medical witnesses alone for, contrary to the interpretation of the majority, the testimony of the lay witnesses (neighbors) did not establish anything to contradict the medical testimony nor to establish that she was not insane. In examining the neighbors at the trial, the question as to her sanity or insanity was not exploited. Nonetheless, many did testify to her nervousness, illness, apprehension, and worry. None of them said that she was perfectly normal and that there never had been anything wrong with the accused. The accused was mentally ill and suffered from December 1952 to the day of the fatal incident, getting progressively worse, had been hospitalized, and was under psychiatric observation and treatment. I cannot understand, in the face of all this testimony, where anyone could find any evidence of normalcy in the accused.

Paragraphs 5a, b, and c of Air Force Manual 160-42 in the 1950 and 1953 editions are substantially the same, practically word for word in most instances, except that the crucial test applied in this case was radically and greatly changed. I do see a very big difference between the test of whether a person would commit an act "with a policeman at his elbow" (par 5c, 1950 edition), and whether a person is likely to commit the "act had the circumstances been such that *immediate detection and apprehension was certain*" (par. 5c, 1953 edition) (Emphasis supplied). It certainly makes a mighty big difference if a policeman is at one's elbow, physically present in shining armor, ready to restrain you, than if you have to stop, think and consider all the possibilities that if you did commit the crime, you could not expect to get away because you were bound to be immediately detected and apprehended. Physical presence of the policeman requires no thinking nor reasoning it out; you can see him; whereas the risk of immediate detection and apprehension requires some thought, planning, reasoning a matter out,

and stopping to think of the consequences of one's act, i. e., the detection and ultimate apprehension.

Considering the testimony of the three prosecution witnesses, who were compelled, bound to testify as they did because of the restriction placed upon them by the "policeman at the side" theory, the affidavits of Martin and Graves pertaining to their having no choice and that they were not able to properly express themselves as professional men, and the testimony of Captains Heisler and Edelson, for the defense, I do not find that the testimony of the psychiatrists is "in diametrical opposition."

129 Martin says, in his affidavit, that the "Manual makes it impossible to explain Mrs. Covert's lack of ability to adhere to the right" and if that strong limitation had not been present he would have testified that "her condition could be explained as a irresistible impulse." Therefore, she was not able to adhere to the right, and, under the rule in the Manual for Courts-Martial, 1951 (par. 120b, p. 200), she was not legally responsible for her act. That certainly would have made his testimony agree and not be in "diametrical opposition" to the defense witnesses. It is, therefore, not a question of "acceptance and rejection of conflicting testimony."

The court did not err in rejecting or accepting the testimony of one set of witnesses against the other, but was misled by the prosecution's own witnesses who were not permitted to freely and unhampered testify as to their true and honest opinions, by the trial counsel in his trial tactics of pursuing this erroneous and discarded theory, and by the law officer who gave to it the erroneous rule in his instructions for it to follow.

The majority contend that there is considerable diversity of opinion in civilian jurisdictions as to application of this doctrine of irresistible impulse. They should have said there was. I don't believe with the removal of the policeman at the side theory that there may any longer be reason for any such diversity of opinion. As now stated, the theory of irresistible impulse is closer to, and conforms with the theory of civilian practice. That rule may have been well-settled in the military prior to 23 May 1953, but that rule was found to be wrong, too strict, and finally abandoned by the military. It no longer exists.

The majority state that they did not find sufficient disagreement in the opinions expressed by Lieutenant Colonel Martin and Captain Graves in their affidavits as against their testimony at the trial. Well, I don't know what more Colonel Martin could have said than that the Sanity Board was "hindered" in reaching its conclusion. "The Manual makes it impossible to explain Mrs. Covert's lack of ability to adhere to the right" and "If that strong limitation had not been present, *her condition could be explained as a irresistible impulse*" (Emphasis supplied). At the trial he said the act

Dr. Martin—also testifying for the Government—indicated that the accused could adhere to the right, although he believed that she was subject to an impairment of ability to do so by reason of the dissociation of her personality at the time of the killing. Her dissociative reaction manifested a long-standing psychoneurotic disorder, and placed her in a twilight area near the borderline of psychosis. On the night of March 10, the question of the right and wrong of an act did not at all influence her behavior, since the unconscious personality had assumed control. Colonel Martin stated that there was no evidence of premeditation or prior consideration by the accused of the slaying before us.

Trial counsel directed the attention of this witness to the definitions of irresistible impulse contained in AFM 160-42, and reminded Dr. Martin that he was bound thereby in his testimony. Martin replied that, under the standards laid down by that Manual, entitled "Psychiatry in Military Law," he had concluded that the accused was mentally responsible in a criminal sense—although he commented to the effect that he knew nothing of the law other than that which was stated in this Manual. In his unsolicited post-trial affidavit submitted to the convening authority, he elucidated this position. There he mentioned that Mrs. Covert's acute dissociative reaction had resulted in

"... a personality (ego) disorganization that permits the anxiety to overwhelm and momentarily govern the total individual and that this occurs with little or no participation on the part of the conscious personality." [Emphasis supplied.]

And he added that:

"... In such cases as these, as is well known, a person may be brought out of an acute state of dissociative reaction by some shock as simple as being slapped in the face. In this connection, I believe that the reaction through which Mrs. Covert went on the night of 10 March was such that the appearance of a civil authority at her side would have been equivalent to the slap in the face and that she probably would not have carried out the alleged act. The same probably would have been true if her children would have come into the room. But none of these things happened and she remained in a dissociated state until she had taken the sedatives and fallen to sleep." [Emphasis supplied.]

Major Troy's conclusion was that the accused was mentally responsible within the standards laid down in AFM 160-42, and that

she would not have committed the act had there been a policeman at her side. Elaborating his views, he testified:

On the night of the offense, this extreme tension and mixed-up feelings, depression, I feel, sort of came to a head, almost overwhelmingly, to the point that she, as many normal people feel in a shock, of a severe stress, that she worked—that she operated almost in an automatic or dazed manner. I think that her judgment, that her actions of that time, were carried on in this sort of dazed, automatic-like manner; that the ambivalence, the mixed feelings, the depression; that she wanted to give her children something, that her own life was, she felt, ruined; that she had nothing to gain; and that her husband stood in the way of anything she might give her children—she expressed the idea that she might take her own life, but if she did that the money—the children would fall heir to the husband, and that they again would be in the same boat.

"So I feel that it was in this dazed, impaired perhaps, state of mind that the offense was committed."

At one point Dr. Troy stressed the notion that it was possible for psychiatrists reasonably to disagree in diagnosis. And he appears to have been in disagreement with his colleagues respecting Mrs. Covert's capacity to premeditate the homicide, since he was the only expert witness who stated that she *could* premeditate. Interestingly enough, Major Troy had probably enjoyed less opportunity to observe the accused than the other medical witnesses who testified, but was the only one of the group who had been certified by the American Board of Neurology and Psychiatry—although all appear to have been well-versed in their profession.

In their arguments, counsel for both Government and defense noted that all expert witnesses had indicated that they felt bound by the provisions of AFM 160-42. However, defense counsel insisted that, aside from the restrictions of the Manual, they had agreed that Mrs. Covert was irresponsible—but he went on to urge that, even *within* those limitations, the members of the court were required to hold her to have acted without mental responsibility.

The law officer, in instructing the court-martial stated: "If the accused would not have committed the act had there been a military or civil policeman present, she cannot be said to have acted under an irresistible impulse." He neglected, however, to instruct the court specifically with respect to the possible effect of the psychiatric testimony on the issue of Mrs. Covert's premeditation.

153 Treating first the two certified questions, we observe that United States v. Kunak, 5 USCMA 346, 17 CMR 346, pro-

vides a complete answer to both. There we reversed a conviction for premeditated murder and returned the cause to The Judge Advocate General of the Army for reference to a board of review. We stated:

"This brings us to an error which we conclude is fatal to the findings and sentence on premeditated murder. It involves the question of whether the law officer erred in failing to instruct the court-martial members that they might consider the mental deficiency of accused—short of insanity in the legal sense—in determining his capacity to premeditate. We have on several occasions mentioned the necessity of covering that issue by an appropriate instruction if it is raised reasonably by the evidence. One can hardly contend in this case that there was no substantial evidence of mental deficiency which might interfere with those mental processes. The instruction on premeditation is sketchy and while the one defining insanity informed the members of the court-martial that they could not convict the accused of the crime charged if there was a reasonable doubt about his mental responsibility, it is deficient, for the purpose under consideration, in that it was tied up to legal insanity which would exculpate the accused of the offense charged and all included offenses. The law officer nowhere suggested the important principle that mental impairment, less than legal insanity, might be considered by the court-martial members when they were deliberating upon the element of premeditation. Significantly, missing in this case is an instruction to the effect that if in the light of all evidence the court-martial has a reasonable doubt that the accused was mentally capable of entertaining the premeditated design to kill involved in the offense of premeditated murder it could find the accused not guilty of that degree of the crime."

IV

We cannot accept the accused's claim that the evidence is insufficient to sustain her conviction. We are sure that our statement of the Government's evidence on the issue indicates that the members of the court could reasonably have reached a conclusion that the accused was mentally responsible. While we believe that certain of the psychiatrist witnesses predicated their conclusion of responsibility on an incorrect interpretation of AFM 160-42—as we shall develop later—we do not consider that this phenomenon warrants dismissal of the charges for insufficiency.

154 Moreover, the presumption of sanity must be taken into account. Certainly in this case—and probably in almost any other—that presumption will be sufficient to shield a finding of guilty from a holding that, as a matter of law, the accused was

mentally irresponsible. Of course, the presumption would not serve to preclude a board of review, or other reviewing authority with general fact-finding power, from weighing the evidence for the purpose of determining whether, *as a matter of fact*, the charges should be dismissed, or returned for a rehearing. In this connection, the following comments from *United States v. Biesak*, 3 USCMA 714, 14 CMR 132, seem apposite:

"Such reasoning has been utilized in dealing with the presumption of sanity. The Massachusetts court—among others—has indicated that, although the presumption of sanity may vanish, 'the fact that a great majority of men are sane and the probability that any particular man is sane may be deemed by a jury to outweigh in evidential value testimony that he (the accused) is insane.' *Commonwealth v. Clark*, 292 Mass. 409, 198 NE 641. See also *Commonwealth v. Cox*, 327 Mass. 609, 100 NE 2d 14. Cf. *People v. Chamberlain*, 7 Cal. 2d 257, 60 P. 2d 299. The court added—properly and cautiously—that it is not 'the presumption of sanity that may be weighed as evidence, but rather the rational probability on which the presumption rests.' Our decision in *United States v. Burns*, *supra*, reaches the same result, although the point was not then expressly considered by us. In that case the Government relied solely on the 'presumption of sanity,' but the defense offered psychiatric testimony that the accused was insane. Upon review we ordered a rehearing for failure of the law officer to instruct the court concerning insanity, which had been raised by the evidence. We did not, however, dismiss the charges, which would seem to have been called for if the 'presumption of sanity'—or, at least, the rational probability which is the core of that presumption—were insufficient to sustain a finding that the accused was sane."

V

Moving to the appellant's second point, we observe that the terms of AFM 160-42 are identical with those of TM 8-240, which has been before us recently in two cases. *United States v. Kunak*, *supra*; *United States v. Smith*, 5 USCMA 314, 17 CMR 314. Indeed, TM 8-240 and AFM 160-42 were promulgated jointly by the Departments of the Army and the Air Force—with the result that we deem applicable to the latter publication the remark of the majority of this Court in *United States v. Smith*, *supra*:

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"... However, we have never held—or believed—that the Technical Manual in question was of itself in any way binding on this Court, nor intended to be controlling on either a court-martial or an expert witness."

137 general. He must be prepared to say whether the defendant's mental state was such that he was capable of having the degree of intent, wilfulness, malice, or premeditation which the law requires for determination of guilt or for a certain degree of guilt."

The Manual for Courts-Martial, 1951, provides that:

"A murder is not premeditated unless the thought of taking life was *consciously conceived* and the act or omission by which it was taken *was intended* * * *." (par. 197d, p. 352)

(Emphasis supplied)

Lieutenant Colonel Martin and Captain Graves, both prosecution witnesses, testified that there was no evidence of premeditation, reiterated this conclusion in their affidavits, and the Sanity Board likewise found none (R. 243, 257, 274). Captain Heisler and Captain Edelson, for the defense, testified to the same conclusion (R. 214, 288).

Ordinarily, a person is not punished criminally unless he did the act with some wrongful state of mind. This fundamental principle of criminal justice is at least as old as Christian ethics—if the mental state requisite to a given crime is absent, the crime has not been committed. To what cause the absence of such mental state is to be attributed would seem immaterial (Hall, Principles of Criminal Law 143-7 [1947]; Sayre, The Present Signification of Men's Rea in the Criminal Law, Harvard Legal Essays 399, 401 [1934]).

The law officer failed to instruct the court as to the effect that accused's mental state might have had on her ability to premeditate. The issue of mental impairment having been fairly raised by the evidence, such instructions should have been given whether or not any request for such instructions had been made (U.S. v. Burns, *supra*; U.S. v. Larry [No. 1896], 2 USCMA 415, 9 CMR 45; U.S. v. Niolu [No. 1040], 2 USCMA 513, 10 CMR 11; ACM S-5536, Hankins, 10 CMR 830; ACM S-5903, Gillespie, 11 CMR 718; CM 360874, Murphy, 9 CMR 473).

Failure of the law officer to instruct the court that if they found accused's reason so far impaired that she was unable to premeditate, they could not find her guilty of premeditated murder, was reversible error.

138 In all murder cases, the first thing one usually looks for is the motive. That very often is the most important piece of evidence which establishes the intent to kill, why the crime was committed.

We do not have here a Ruth Snyder-Judd Gray triangle. No question of another woman or man is involved. Jealousy was not the motive. There was no design on the part of the accused to get

rid of her husband to collect his insurance, no cause for revenge because of brutal beatings, nor was this act committed in the heat of passion, after an argument, struggle, or fight.

In spite of his shortcomings, she loved her husband, could not stay away from him; tried it once, became miserable, and had to go back. She had the prospect of getting a large sum of money of her own which would have assured for herself and her children a comfortable life away from her husband. No, we do not have any of the usual reasons for the commission of homicide.

Why did she kill him? Was she the brutal, mean, cruel, hard, criminal type of a woman to whom a life is of no value? No, on the contrary, she was a quiet, calm, meek, motherly type of a woman, well-liked, and respected by all who knew her.

But, she was sick, mentally sick, getting progressively worse, until the pent-up tension "came to a head" and, without deliberation or consciously knowing what she was doing, she "killed Eddie." I cannot, from all the evidence in this case, in good conscience, agree that this unfortunate sick woman is guilty of premeditated murder of her husband whom she dearly loved.

At the time of the commission of the act, the accused was pregnant (R. 124, 277). (The child was born during her incarceration on 7 Dec. 53).

The accused was not mentally responsible for her act, was legally insane at the time of the commission of the act, and the findings of the court were contrary to the weight of the competent evidence. The errors, in limiting the medical witnesses from testifying as to their professional expert opinions; the restrictions placed upon their testimony by an erroneous, abandoned, discarded theory of law (policeman at the side); and that incorrect theory having been erroneously submitted to the court for their consideration by the law officer, all are of such magnitude as to require a reversal of the findings of guilty. The findings of guilty and the sentence should be set aside and the charge dismissed.

ALEX PISCIOTTA

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EXHIBIT "F" TO RETURN AND ANSWER ORDER

UNITED STATES OF AMERICA, ss:

The Honorable, The Judges of the United States Court of Military Appeals

To The Judge Advocate General, United States Air Force:

GREETING:

WHEREAS, lately in a general court-martial of the United States Air Force in a case between the United States and

Clarice B. Covert, a person accompanying the Armed Forces of the United States without the continental limits of the United States and its possessions, in which the accused was found guilty of violations of the Uniform Code of Military Justice and sentenced to life imprisonment, and said sentence was approved by the convening authority, and said sentence was affirmed by the Board of Review as by the inspection of the record of trial which was brought into the United States Court of Military Appeals by virtue of a certificate for review and a petition for grant of review, agreeably to the Uniform Code of Military Justice in such case made and provided, fully and at large appears; and

WHEREAS, on the fourth day of November, in the year of our Lord one thousand nine hundred and fifty-four, the said case came on to be heard before the said Court on the said record of trial which was brought into the United States Court taken under advisement by said Court:

ON CONSIDERATION WHEREOF, it is now ordered by this Court that the decision of the said Board of Review in this case be; and the same is hereby, reversed for the reasons set forth in the following opinion:

141. AND IT IS FURTHER ORDERED, That this case be, and the same is hereby, remanded to The Judge Advocate General of the United States Air Force, for proceedings not inconsistent with the opinion above. You, therefore, are hereby advised that such proceedings be had in said case as will cause the convening authority to order a rehearing, if such rehearing is practicable; and, such other and further proceedings as according to right and justice and the Uniform Code of Military Justice ought to be had, the said decision of the Board of Review notwithstanding.

WITNESS, the Honorable Clerk of the United States Court of Military Appeals, the sixth day of July, in the year of our Lord one thousand nine hundred and fifty-five.

ALFRED _____

Clerk of the United States Court of Military Appeals.

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United States Court of Military Appeals

No. 4974

UNITED STATES, APPELLEE

CLARICE B. COVERT (A PERSON ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES WITHOUT THE CONTINENTAL LIMITS OF THE UNITED STATES AND ITS POSSESSIONS, APPELLANT

On Certification from The Judge Advocate General of the U. S. Air Force and on Petition of the Accused Below ¹

Frederick Bernays Wiener, Esq. and Col. A. W. Tolen, USAF, for Appellant,

Lt. Col. Emanuel Lewis, USAF, Lt. Col. Harold Anderson, USAF, Maj. William G. Carrow, III, USAF, and Capt. Giles J. McCarthy, USAF, for Appellee.

OPINION OF THE COURT—Decided June 24, 1955

PAUL W. BROSMAN, Judge:

This case involves a further problem of mental responsibility. The accused woman was tried in England by general court-martial for the premeditated murder of her husband, in violation of the Uniform Code of Military Justice, Article 118, 50 USC § 712. She was found guilty under the charge and its specification and sentenced to life imprisonment. The convening authority approved both the findings and sentence—and a board of review in the office of The Judge Advocate General, United States Air Force, with one member dissenting, has affirmed. The case is before us on both the accused's petition for review and a certificate from The Judge Advocate General. The questions certified are as follows:

"a. Upon the state of the evidence in this case bearing upon the issue of sanity, was the Law Officer under a duty to provide the court-martial with further specific instruction as to the possible effect of such evidence upon the mental capacity of the accused to entertain premeditation?"

"b. If the answer to the preceding question is in the affirmative, may the error be purged by affirming so much of the approved findings as find the accused guilty of unpremeditated murder and thereafter reconsidering the approved sentence?"

¹ ACM 7031.

The grant of review by the Court authorized argument on the following points, which we phrase generally:

(1) Is the evidence legally sufficient to establish, beyond a reasonable doubt, that the accused was mentally responsible for the crime charged?

(2) Did the limitations on certain expert witnesses testifying on irresistible impulse, which are provided in AFM 160-42, constitute an instance of improper command influence?

(3) Did the law officer err in restricting defense counsel in his cross-examination of the Government's expert witnesses?

(4) Did the law officer err in instructing that the "police-man-at-the-elbow test" was a proper method for determining whether the accused was impelled to commit the crime by an irresistible impulse?

II

We accept defense counsel's concession that no question respecting the cause or agency of death is involved in the present appeal. It is properly admitted by them that the evidence against the accused on this issue is undisputed—and because of this no more than a brief summary of the facts and circumstances immediately surrounding the homicide will be related. On March 11, 1953, during an interview with Mrs. Covert, Captain Ivan C. Heisler, a psychiatrist of the 5th Hospital Group, obtained information which caused him to believe that during the previous night a killing had occurred at the quarters occupied by her husband and his family. Acting on this knowledge, he obtained a key to her and her husband's home and—after leaving his patient in the care of a nurse—went to their quarters, accompanied by the base surgeon, and an air police officer. On arrival, they proceeded to the upstairs bedrooms, and saw in one of them a cot on which a number of blankets had been arranged. After removing these, they discovered the dead body of the deceased, the accused's husband. A pillow covered his head, and there was much blood on the bed clothing. It was quite obvious that he had been dead for some time, and a subsequent examination revealed that death had been caused by blows on his head and face which had been inflicted by a blunt instrument. A hand ax, which was shown later to bear stains of human blood, was found near the fireplace in the first floor front room of the quarters, and a suit of bloodstained pajamas was subsequently located hidden in a laundry tub on the premises. In pretrial statements, made by the accused to various Air Force medical and investigative people, she admitted that she had committed the offense charged sometime during the night of March 10-11, 1953.

The evidence presented with respect to the accused's mental responsibility was extensive, and included her life history and a detailed psychiatric exposition of her mental condition at the time of the homicide. According to this account, the accused had been born prematurely in Augusta, Georgia, on December 21, 1920, as a child of her mother's second marriage. Her childhood was unhappy, and was marred by frequent quarrels between her parents and by cruel treatment directed by the father against both herself and her mother. She felt unwanted, alone, afraid, without parental love. The accused was reclusive during high school days and markedly hesitant to invite friends to her home—which she described as a dirty, broken down three-bedroom house next door to a chicken yard and an alley. Her father she remembered as coldly indifferent, and so resentful of the fact that she had not been born a boy that—according to her mother's account—he had on one occasion gone so far as to attempt to toss her out of a window, and
145 on another to choke her. In 1926 her father left their home, but subsequently returned. However, in 1932 he abandoned his family permanently. His distaste for the accused appears to have been characterized by the frequent presentation to her of gifts and toys designed for boys, and he was plagued by incessant financial difficulties occasioned by gambling.

After completing high school, the accused unwillingly left her home to begin nurses' training, since she continued to feel unwanted there. After meeting the deceased—then an infantry second lieutenant—in January 1943, she married him in March of the same year. Between May 1943, when he departed for overseas duty, and November 1945, when he returned to the United States, her husband was frequently in financial trouble—and at one time she was required to find \$600.00 to free him from custody. On resuming civilian life, he became an unqualified wastrel, took to drink, and spent most of his wife's accumulated savings of more than \$5000.00 before re-entering the military establishment in 1946 as an Air Force master sergeant.

New financial problems ensued, and by November 11, 1947, when the pair's first child was born, their savings had been exhausted—and an insurance policy had been converted to take care of necessary medical expenses and hospitalization. During the accused's pregnancy, Sergeant Covert had covered a \$450.00 gambling loss with a worthless check. Conduct of this nature led to a separation—but the accused became nervous, sleepless, and less able to perform her daily tasks. A reconciliation was followed by the birth of a second child in September 1950.

In May 1951 the deceased was assigned to duty in England with the Seventh Air Division—and, after his wife's arrival four months later, they resided in London until July 1952. The destruction by

fire of certain goods of hers which had been stored in the United States, the poor health of her younger son and his delay in learning to speak—together with the Sergeant's continued gambling—all served to keep the accused on tenterhooks. In December 1952, after the couple had been transferred to Upper Heyford, Eng-
146 land, the accused was informed that she was about to inherit a sizeable sum of money—glad tidings from which, unfortunately, her present tragic situation later developed. The accused's preference for saving this windfall for their children's education and future welfare clashed sharply with her husband's desire to acquire a new automobile and tour the European continent—a difference of opinion which brought further worry to the accused. Indeed, she began to feel incapable of continuing her harassed life—especially as a possibility remained that she would be deprived entirely of the prospective legacy by the reappearance of her long missing father, who might have been able to establish a claim to the fund superior to her own.

After, as well as before, the arrival of news concerning her probable inheritance, Sergeant Covert continued to display what appears to have been his established pattern of questionable conduct—which, as numerous witnesses portrayed it, involved poor judgment, childishness, gambling, financial irresponsibility, and—on at least one occasion—the public humiliation of his wife. Indeed, in many unpleasant ways he displayed ever-greater similarity to the accused's vanished father. As identification of husband and father grew, the accused's depression increased. Having sought aid from a military medical facility, she was directed to consult with a Captain Cogar, an Army physician, who, on February 16, 1953—the date of her first visit—prescribed a mild sedative, and advised her to revisit him after three days. No indication of improvement was observed on her return—and, in view of a possible hypothyroid condition, she was referred to a hospital for a complete physical examination. However, hospitalization revealed no organic difficulty, and she was discharged, after having been furnished with a supply of sleeping tablets. On March 9, when Dr. Cogar next saw the accused, she appeared emotionally disturbed, and stated that she felt as though "something were about to let go," and that "if
147 she did not obtain relief from her nervous condition she was afraid something serious might happen." Concluding that the accused was thoroughly upset, Cogar again prescribed sedation, and arranged for her an appointment with Captain Heisler, a psychiatrist stationed nearby.

This medical officer talked with her on the afternoon of March 10, 1953, for approximately one and one-half hours—a somewhat longer engagement than is normal for such a purpose, but one occasioned by the accused's obvious distress and agitation. Staring almost

constantly at the floor, Mrs. Covert engaged in no spontaneous activity, save that she chain-smoked cigarettes. She related her symptoms, her anxiety feelings and sleeplessness, as well as other matters which had caused her mental disturbance over the years. Heisler considered immediate hospitalization, but decided against such a disposition at the time in view of crowded infirmary conditions, limited medical facilities, and what he then deemed an absence of urgency.

Also on March 10, the accused visited the home of a friend and neighbor, a Mrs. Scamordella, and at the time appeared normal and neither upset nor nervous—even remarking that she felt “pretty good.” Mrs. Scamordella invited her to accompany the former to a bingo game that evening, but the invitation was declined. Shortly before 6:00 p. m., Sergeant Covert and the two children appeared at the Scamordella home, and soon thereafter the entire family returned to their own quarters—with the accused and her husband seeming to be in a happy mood and on good terms. After the evening meal at the Covert residence, the husband retired at his usual hour, apparently without argument between the two or other untoward episode. He did not rise again, for while he lay sleeping, Mrs. Covert killed him with an undetermined number of ax blows. At the time she was clad in flannel pajamas which—being covered with blood—she placed in a washtub. In her testimony at the trial, the accused displayed a loss of detailed recollection regarding the events which transpired that evening, and could offer no reason for her act. After the homicide she covered the body, administered to herself a heavy dosage of drugs, and thereafter composed
148 herself for sleep in the bed occupied by her dead husband—apparently with no expectation that she herself would ever awaken from slumber.

Between 1:30 and 2:00 p. m. the following day, Mrs. Covert and her children were seen walking across the lawn toward a nursery, where she left the children. She appeared pale, seemed to stagger, and experienced difficulty in locating the knob on the nursery door. Later she departed from her home for a two o'clock appointment with Captain Heisler. She wore slacks and a leather jacket; her hair was uncombed; she was otherwise dishevelled and seemed obviously distressed. Arriving late for the medical appointment, she responded to the psychiatrist's question concerning the state of her health by commenting that it was “not so good”—and thereafter, with no sort of preface, stated in an unemotional and dull monotone, “I killed Eddie last night.” After this and later remarks had precipitated the discovery of the Sergeant's body, Mrs. Covert was confined to the infirmary for the greater part of the afternoon and was interrogated to a limited extent.

Considering her condition as he observed it on March 11, 1953—

together with information obtained from the previous day's interview and subsequently acquired data—the Captain concluded that the accused suffered from a psychotic depressive reaction at the time of the slaying. In short, he believed her to be a psychotic person who was unable to distinguish right from wrong, and to adhere to the right, at the time of the act charged. Among other factors, his opinion was fortified, he felt, by the comment of Mrs. Covert—an unreconstructed Southerner—to the effect that even the presence of General Sherman would not have prevented her from killing her spouse. This expert witness believed that, under any and all tests, including that presented by AFM 160-42, the accused was wholly irresponsible.

Relying on tests performed on the accused by him after the offense, one Captain Edelson, a clinical psychologist, supported Heisler's views. Edelson was reluctant to confine himself to what he described as the "black and white field" of psychiatry—since he preferred a more flexible approach to diagnosis—
149 but he did consider that, at the time of the killing, Mrs. Covert suffered from a paraschizophrenic condition, and was a totally irresponsible psychotic whom neither policemen, nor the entire United States Army, would have deterred from the homicide. He termed "ridiculous" the findings of a sanity board consisting of three psychiatrists, Lieutenant Colonel Richard L. Martin, Captain James H. Graves, and Major Richard E. Troy.

Captain Graves had been the original draftsman of the sanity board's report, although it had been rewritten extensively. In his opinion, Mrs. Covert on the night of the killing had suffered from a dissociative reaction, but this had not, in his opinion, reached psychotic proportions. However, as he pointed out: "In the case of Mrs. Covert, I think we can state very securely that she is not a character and behavior disorder." In further clarification of dissociative reaction he noted:

"... there is in psychiatry, and in the official nomenclature which we use—we have to use, in military psychiatry, which we practice—there is a designation which we would use for this sort of thing, which we call a disassociative reaction. It is a big word, but it just means, for a temporary period of time the personality is not functioning as a whole. The whole personality is not working."

With reference to the accused's ability to adhere to the right, the following colloquy occurred during direct examination of Captain Graves by trial counsel:

"Q. Do you feel that if a policeman were present, or someone else were present, she would have refrained from the act.

"A. Yes, I do." [Emphasis supplied.]

The passages from Captain Graves' testimony set out below are also pertinent to his approach to the "policeman at the elbow" test:

... If there had been a policeman there, for instance, this could not have come about—I mean, she would have been jolted out of it. *If her children would have been there, I am sure she would have been jolted out of it.*

150. "After the crime, of course, she was in a sort of—she was in a depressive state, which would go along with being in the very difficult straits in which she found herself, but there has been no really fundamental change in her personality at the time of the crime or after. There was, in my opinion, a temporary weakening of the power of her conscience, a weakening of her power to adhere to right and to know right from wrong and to act upon it, but it was not abrogated; it was not thrown aside completely; it was not completely inundated, let's say. She still possessed the capacity to adhere to the right and to know right from wrong, and if there had been some disturbing influence, like someone walking into the room or the children waking up, or something like that, that occurred at this time, I think that this disassociation that I speak about would not have produced the crime for which she is being tried." [Emphasis supplied.]

Captain Graves emphasized with respect to Mrs. Covert's condition:

"But, according to the regulations that are set down for us ... I have no choice but to say that this was a neurotic reaction. There was nothing psychotic about it, in my opinion, it was a temporary, partial brushing aside of the conscience. The personality was not disintegrated." [Emphasis supplied.]

However, it appears—according to Dr. Graves—that there were powerful emotional forces operating on Mrs. Covert which rendered her incapable of conceiving of and executing the crime in a premeditated way. The idea of the offense came to her in a flash, and was as rapidly executed. Therefore, this witness expressed to the court-martial definite doubt that the killing was premeditated. In his view, Mrs. Covert

... felt very futile about the whole business, and she, I think, had formed some intent of suicide and the question of what might be done to her in this disassociative state I don't think was very strong in her mind. ... just don't think that she was capable of thinking of it, you see.

United States, 1951, has the same provision. In paragraph 120b, I find the following:

" . . . To constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also completely deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged. Thus a mere defect of character, will power, or behavior, as manifested by one or more offenses, ungovernable passion, or otherwise, does not necessarily indicate insanity, even though it may demonstrate a diminution or impairment in ability to adhere to the right in respect to the act charged. Similarly, mental disease, as such, does not always amount to mental irresponsibility."

In *United States v. Smith*, *supra*, Judge Brosman, speaking for the majority, had this to say about that provision:

"The Manual for Courts-Martial emphasizes that 'to constitute lack of mental responsibility the impairment must not only be the result of mental defect, disease, or derangement but must also *completely* deprive the accused of his ability to distinguish right from wrong or to adhere to the right as to the act charged.' Paragraph 120b: (Emphasis supplied.) Thus, mere *impairment* of the ability to adhere to the right does not constitute a defense, although it may form a mitigating circumstance. Paragraphs 120, 123. The emphasis on *complete* inability to adhere to the right renders it difficult to deem mentally irresponsible an accused person who would not have performed the act had there been an appreciable likelihood that he would be arrested and punished."

Even though that principle may, in the words of the psychiatrists, be too narrow and restrictive, I believe we have placed our approval on it and I have no desire to retreat. That concept, of course, narrows the area in which medical experts may operate, contrary to the wishes of some of them, but it furnishes a satisfactory reed for the experts and the Courts to lean upon.

170 Finally, in *United States v. Smith*, *supra*, a majority of this Court reached the conclusion that the provisions embracing the policeman at the elbow test and the fear of detection test, while differing somewhat in wording, possessed an identical core of meaning. If we could so conclude from our understanding and knowledge of the principles of psychiatry, I am willing to concede the experts who testified in this instance had the perspicacity to reach a similar conclusion long before this case was tried. If I must choose on the basis of this record, I would conclude that any

claimed misapplication of principles is imagined at this level. For the foregoing reasons, I would answer the questions of The Judge Advocate General of the Air Force and dispose of the assignments of error by reversing the finding of premeditation, affirm a finding of unpremeditated murder and return the case to the board of review for reconsideration of the sentence.

171

EXHIBIT "G" TO RETURN AND ANSWER

Maj. Duree/pm/74639/Wrtn. 8 Jul: 55
Office of The Judge Advocate General

11 Jul. 1955

SUBJECT: Decision of the United States Court of Military Appeals in the case of Clarice B. Covert (A person accompanying the Armed Forces of the United States without the continental limits of the United States and its possessions).

To: Commander, Headquarters Command, USAF. Attn: Staff Judge Advocate; Bolling Air Force Base, Washington 25, D. C.

1. Appellate review in the case of the person named above has been completed. Your attention is invited to the inclosed copy of the preliminary court-martial order and two copies of the decision of the United States Court of Military Appeals, together with the receipt for accused's signature. You are requested to serve the copy of said decision which bears the notation "Accused's Copy" and a copy of this letter upon the accused, and to obtain her receipt in duplicate on the forms inclosed for this purpose. It is requested that you return by indorsement to this letter such receipt or, upon her refusal to sign same, a certificate of service upon her.

2. Under the provisions of Uniform Code of Military Justice, Article 67(f) and the Manual for Courts-Martial, United States, 1951, paragraph 101, and in accordance with the mandate of the United States Court of Military Appeals, you are hereby instructed to take action in accordance with the decision of the United States Court of Military Appeals, and to order a rehearing if such rehearing is practicable.

3. It is requested that you forward to this office ten (10) copies of the supplementary order promulgating the results of appellate review bearing the number of this case as follows:

(ACM 7031).

4. Incls.

1. R/T ACM 7031.

2. Initial promulgating order.

Yet it is unmistakable from the testimony of all of the expert witnesses—and the comments of counsel for both Government and defense—that, in the present trial, AFM 160-42 was regarded by the experts as controlling, and was of infinitely greater influence on the psychiatric testimony than was TM 8-240 in either Smith or Kuniak.

This influence would appear harmless—to the extent that the principles prescribed in AFM 160-42 for the determination of mental responsibility constitute correct statements of military law. In this connection we must advert once more to the “policeman at the elbow” test, which played a major role in the present trial, and which was promulgated in paragraph 5a of the publication with which we are concerned here. In speaking of this somewhat ambiguous test, the majority said in *United States v. Smith*, *supra*:

“The basic difficulty is that which may arise from a too literal application of the ‘policeman’ test. Perhaps, indeed, the accused would not have committed the offense in the company of a policeman, or of anyone else for that matter, for the plain reason that he wished to act in private—this despite the fact that he nonetheless knew he would be apprehended forthwith. Perhaps, too, he would not have attempted the deed with a policeman at his elbow, because he feared that the policeman would halt him prior to its completion. Cf. Davidson, *Forensic Psychiatry*, *supra*, page 8; Neustatter, *supra*, page 97. Also, perhaps the presence of a policeman would have served to make more vivid to his mind the prospect of ultimate apprehension and punishment. And perhaps, finally, the presence of the policeman would have exercised some other symbolic effect in precluding or delaying the commission of the offense—quite apart from the probability of detection and punishment arising from his presence. Cf. MacNiven, *Psychoses and Criminal Responsibility, Mental Abnormality and Crime*, 1944, page 53.

“These possibilities appear to be somewhat theoretical. Yet psychiatrists on occasion are prone to draw distinctions difficult for lawyers and judges to comprehend. In light of these, it is distinctly possible that the ‘policeman’ test—literally applied—may mislead. Therefore, the wording of the 1953 edition of TM 8-240 should be utilized as a guide for instructions and the like. Indeed, in a case in which it is clear that the trial was premised on an erroneous, overly literalistic construction of the ‘policeman’ test, as phrased in the 1950 Technical Manual, we might well be compelled to reverse.”

156 In the case at bar we entertain no doubt that a much too literalistic interpretation of the “policeman” test was adopted

by both Captain Graves and Colonel Martin. For them, it was not the likelihood of *apprehension* implicit in the test which served as the criterion. As a matter of fact, absent any sort of policeman, and premitting subsequent admissions on Mrs. Covert's part, the likelihood of detection of her crime was little short of enormous. Quite understandably the accused—contemplating suicide as she seems to have been, according to evidence from both defense and Government—would have been unaffected by any degree of probability that her act would be discovered by the police, even if she had been able to weigh that probability consciously. On the other hand, the presence of a policeman, *or that of any other person*, might have shocked Mrs. Covert from pursuance of her dazed and virtually automatic behavior—completely apart from any suggestion of apprehension and ultimate punishment. In Captain Graves' view, the presence of her children would have served equally well—better perhaps in fact—to prevent Mrs. Covert's commission of the crime, regardless of whether their appearance in the room would have enhanced the probability of detection and apprehension to any measurable extent. Perhaps Colonel Martin in his post-trial affidavit best expressed this concept, which he seems to have shared with Dr. Graves. He indicated that the presence of a policeman, or of anyone else, "at the elbow" would have served as a slap in the face, which would have startled the accused from her virtual trance.

It will be recognized, of course, that, when properly applied, the "policeman" test, as provided in AFM 160-42, is not at all directed to the effect of a policeman's presence as a "slap in the face," but rather to its suggestion of the likelihood of immediate detection of the crime and apprehension of the perpetrator. *United States v. Smith*, *supra*. By reason of their obvious misinterpretation of the publication under consideration—which, like the experts called by the defense, they mistakenly interpreted to possess *per se* a binding force—Colonel Martin and Captain Graves concluded that
157 the accused *could* adhere to the right. Under a correct interpretation they—and conceivably Major Troy too—might well have concluded that the accused had been irresponsible mentally at the time of the killing. We simply cannot know what they would have believed in the present circumstances.

The error in applying the "policeman" test is too pervasive here to permit affirmance of the findings of guilty. In this connection, the present situation can be distinguished with ease from that exemplified in *United States v. Smith* and *United States v. Kunak*, *supra*. In the former, the real issue at the trial was whether Mrs. Smith was suffering from a mental defect, disease or derangement within the meaning of the Manual for Courts-Martial. This circumstance fortified the majority in its conclusion that there was

no significant possibility that the result at the trial might have been influenced by any misinterpretation of, or ambiguity in, the "policeman" test promulgated in the relevant Army Technical Manual. On the other hand, Mrs. Covert suffered—according to the Government's experts—from a dissociative reaction, which is regarded in the Joint Armed Forces Psychiatric Definitions, Sr. 40-1052-2, NAVMED P-1303, AFR 16-13A as a psychoneurotic condition, and is clearly not a character and behavior disorder. Indeed, apparently all of the psychiatrists here would have agreed that the accused labored under a mental disease or derangement—and the critical issue had to do with the extent to which this mental disease or derangement had operated to destroy her ability to adhere to the right. In resolving this issue, the accused was distinctly prejudiced by a palpable misconstruction of AFM 160-42, from which the law officer failed to relieve her.

In the Kunak case, the concurrence stressed that the defense was scarcely in a position, under the circumstances of that case, to take advantage of ambiguities in the "policeman" test. Also, Judge Latimer explained there that the instruction by the law officer based on this test might well have been beneficial to the accused.

158 As a matter of fact, Kunak's defense of irresponsibility—like that of Mrs. Smith—encountered as its initial and chief obstacle the conclusion by expert witnesses that he was suffering from a mere "character and behavior disorder." Mrs. Covert, however, met no similar difficulty—for all of the experts in this case appear to have agreed that hers was more than a character disorder. Her hurdle lay in the misconstrued "policeman" test—one with which her defense should never have been confronted.

In view of our disposition of the second issue specified under the accused's petition, it is unnecessary that we deal in detail with the remaining two.

VI

Before terminating this opinion, it should be commented that the record reveals a defense presentation by Major J. Schweizer—military defense counsel at the trial—which could scarcely have been excelled in alertness, ability, and preparation, and which furnished the accused with a firm foundation on which to capitalize for appeal purposes on the ambiguity in the "policeman" test.

Since it is evident that a rehearing is required if we are to avoid the danger of a substantial miscarriage of justice, the record of trial in the instant case is remanded to The Judge Advocate General, United States Air Force, for rehearing or other action not inconsistent with this opinion.

QUINN, Chief Judge (concurring):

In my dissent in *United States v. Kunak*, 5 USCMA 346, 17 CMR 346, and in *United States v. Smith*, 5 USCMA 314, 17 CMR 314, I deprecated the Court's sanction of the use of service manuals on psychiatry as affirmative evidence in a court-martial trial. In the *Kunak* case, I pointed out that this kind of technical manual "circumscribes the testimonial freedom" of the military expert witness.

In the *Smith* case, I noted that the military medical experts were obviously, testifying to what they believed the service manuals required, "to the exclusion of their individual professional beliefs." This case confirms my fear that use of the technical manuals on psychiatry are depriving the accused of the right to unbiased and truly professional opinions from military psychiatrists.

I am glad Judge Brosman has recognized the improper influence of the technical manual in this case, and I concur with him in setting aside the conviction and ordering a rehearing. At the same time, I cannot refrain from expressing regret that he has not joined me in a general condemnation of the present use of the service manuals as a restrictive influence on the testimonial freedom of the service doctors.

LATIMER, Judge (concurring in part and dissenting in part):

I concur in part and dissent in part.

I do not share the regrets of the Chief Judge and I do not join in his reasons but his position has consistency in its favor. Certainly, if each future case is to be decided on the basis of whether the military experts in the field of psychiatry do or do not understand the principles which they teach and promulgate, then he has the best side of the argument. However, his assertions do not encourage my support because a careful reading of the opinions in *United States v. Kunak*, 5 USCMA 346, 17 CMR 346; and *United States v. Smith*, 5 USCMA 314, 17 CMR 314, will disclose that the author of the present base opinion has not changed the principles a majority of the Court therein announced. All he has done is to escape their effect by a side-door exit which can be labelled the door for confused experts. Obviously, his purpose is to differentiate this case from those on a narrow ground, but one which I do not find supported by the record. Because of that and because this result is reached through a three-way conceptual approach, with no new principles of law established, an extended discussion of the questions certified and the errors assigned is unnecessary. However, I consider it advisable to place on record my reasons for not joining in an order directing a rehearing in this case.

The disagreement between Judge Brosman and the writer narrows to the single question of whether the psychiatrists

who testified for the Government misunderstood one criterion proposed as a means of measuring an irresistible impulse. I conclude they did not and I hope to support my views by a reference to their testimony. In addition, while I will not develop the point, I believe it distinctly arguable that even assuming the medical experts favorable to the Government misunderstood the test, the confusion was beneficial to the accused.

It is of singular importance to note that four psychiatrists and one psychologist testified at the trial. They were stationed in the same military community, all worked together on this particular case, and each had the benefit of the findings and conclusions of the other. Their education, training and experience was extensive and their qualifications to understand and deal with the principles of psychiatry must be conceded by all. One psychiatrist and one psychologist testified in support of the accused. Two psychiatrists testified partly in support of the Government's cause and partly in opposition thereto. One psychiatrist testified solely in favor of the prosecution's theory. It could happen, I suppose, but it is a bit unusual that only those who testified that the accused was sane are charged by the majority opinion with having misunderstood a principle of psychiatry which dates from the time of the McNaughten rule. They alone are charged with misapplying the policeman at the elbow illustration found in the Air Force Manual. While this case turns on the possibility of misinterpretation found by the majority, I am perfectly willing to accept as my first supporting witness, Dr. Heizer, a very fine defense witness, who testified to the effect that the principles outlined in the Air Force Technical Manual are easy to work with. He had this to say on the matter:

"Q. The defense counsel has cited certain textbooks with which you have said you were familiar, as authorities in the field of psychiatry. Are you also familiar with Air Force Manual 160-42, Psychiatry in Military Law?

A. Yes, sir.

161 "Q. Do you consider that to be an accurate statement of psychiatry as applied to military law?

A. To the military law, yes. It's a regulation which we must follow.

"Q. Are you in agreement with it?

A. Essentially, yes. I believe that—let's put it this way: one can easily work within the framework of the interpretations given in that manual, and we make every attempt to do so."

Moreover, in answers to questions propounded by defense counsel—and, parenthetically, I add that all of the expert witnesses were

entitled to exercise the same mental freedom exercised by Dr. Heisler—he replied:

“Q. Doctor, do you think it would have made any difference on the night of 10 March, to use an old and classic example, if a policeman had been standing near her?

A. I don't think it would have made any difference, short of physical restraint.

“Q. Doctor, in your examinations and conferences with her, has Mrs. Covert ever made any statement as to whether or not any person who might have been standing there would have influenced her or not?

A. Yes; she did.

“Q. What did she say, Doctor?

A. Well, the first occasion when it came up more or less spontaneously, she stated—I think, being a Southerner—it wouldn't have made any difference whether General Sherman had been standing there or not, and on subsequent occasions, taking into consideration the legal questions involved—this was a couple weeks later—asked her specifically about the question relating to a policeman being there, and she felt that she would not even have noticed the policeman. She interpreted the question herself on that occasion as meaning he would physically restrain her, which makes the answer obvious that she herself felt it, which corroborates my own impression that, short of physical restraint, she would neither have noticed or been deterred by the presence of any other individual, as she was not deterred by the presence and very close approximation of her two children to the scene of this act.

As my next supporting witness, I rely on Dr. Adelson, a psychologist, who, like Dr. Heisler, testified definitely and positively that Mrs. Covert was insane. He seems not to have been mentally disciplined by the Technical Manual in the expression of his views and to have understood how the test could be applied to establish insanity. This is his testimony:

“Q. Are you familiar with the term ‘irresistible impulse’?

A. Yes; I am.

162 “Q. Do you think that the definition of irresistible impulse is accurately stated when it is stated that it is an act that a person would do even if a policeman were at their side?

A. I am acquainted with that, the use of that criterion.

“Q. You believe that is an accurate definition of what it is?

A. I consider it a rather accurate definition; yes.

“Q. Do you believe that an irresistible impulse is an act

that a person would commit even if there were policeman [sic] at their side?

A. It appears to me that the policeman being alongside is merely one of many possible criteria by which one can determine whether an act is motivated by an irresistible impulse. In other words, I don't believe I can accurately answer your question very flatly. May I try to clarify that?

"Q. Go ahead.

A. I believe there are other conditions that can—other ways of determining whether an impulse is an irresistible one. The policeman being alongside is certainly a perfectly legitimate one, I feel.

"Q. Are you familiar with Air Force Manual 160-42?

A. Not well, but I have read it.

"Q. Calling your attention to paragraph 5c, wherein irresistible impulse is defined as an act that a person would not have committed if there had been a military policeman at his elbow; do you believe that that is a complete and accurate definition of the term?

A. Yes; I do. "I accept it."

If, as these defense witnesses testified, the test is accurate and easy to apply, I wonder why the testimony of the two experts whom I catalogue as testifying partly to the benefit of the accused and partly to assist the Government is interpreted as showing confusion. I place Doctors Martin and Graves in sort of a neutral class for the reason that, while both testified the accused could distinguish right from wrong and adhere to the right, each expressed an opinion that her mental faculties were so impaired that she did not have the capacity to premeditate. However, their post-trial affidavits show clearly they were favorably inclined toward the accused. While Dr. Graves was not asked to express an opinion on the policeman at the elbow test, I find these questions and answers in the record:

163 "Q. Do you believe, from your observation of the accused, that the act she committed on the 10th of March was the result of an irresistible impulse?

A. Irresistible impulse is not a term that we use in psychiatry. I would have to ask you to define what you mean by 'irresistible impulse' before I could answer your question, I think.

"Q. I call your attention to the definition of irresistible impulse in Air Force Manual 160-42: Psychiatry in Military Law, to paragraph 5c, which sets out the example that the accused would have committed the act even if there had been a policeman at her elbow as being an example of an irresistible

impulse; and with that definition in mind, I ask you, do you feel that the accused acted as a result of an irresistible impulse?

A. No.

Q. Do you feel that if a policeman were present, or someone else were present, she would have refrained from the act?

A. Yes, I do.

Q. You have stated that she was able to adhere to the right, had she chosen to; is that correct?

A. Yes."

This witness had testified that the accused could distinguish right from wrong at the critical time. He followed that testimony by asserting that Mrs. Covert could adhere to the right and he was then asked how he made that determination. In substance he stated that she committed the offense under strong emotional pressure but he concluded she could adhere to the right because her whole life's pattern was to that effect, and he found nothing which would indicate that at the time of the killing she would not be guided by her previous pattern of behavior. If that was the basis for his conclusion, the one Technical Manual criterion played no part.

In connection with the testimony of Dr. Martin at the trial, the policeman at the elbow test seems to have been of little moment because if it was referred to, it was mentioned only once. That particular criterion is probably involved in the following single question and answer:

Q. In answer to one of the defense counsel's questions, I believe the gist of the answer was that the rightness or wrongness of the act did not influence her behavior. Do you mean by that answer that her act was an irresistible impulse, as defined by Air Force Manual 160-42?

A. With that qualification, as defined by this manual, I do not feel that it was what they call an irresistible impulse."

164 As I hope to develop later, while Dr. Martin's ultimate conclusion may have been influenced in part by this test, he did not complain because he misunderstood it, but because he believed the general principles of psychiatry set out in the Technical Manual were too restrictive. Beyond question he asserted that the accused could distinguish right from wrong and that her ability to adhere to the right was only partially impaired and not totally abrogated. He, however, subsequently sought to make that partial impairment sufficient proof of insanity to exculpate the accused from the legal wrong of the homicide—a position a majority of this Court has refused to take.

Major Troy was the one expert who testified that Mrs. Covert had the mental capacity to form an intent to kill and to pre-

inmeditate and that she was sane and responsible for her act. He was interrogated about the policeman at the elbow test and he had this to state:

"Q. Are you familiar with the provisions and standards laid down of mental responsibility in Air Force Manual 160-42?

A. Pretty well.

"Q. Under the standards laid down in that manual and the definitions therein, do you consider that at the time she committed the act on 10 March 1953, she did so as the result of an irresistible impulse, as therein defined?

A. No; I do not believe it was an irresistible impulse.

"Q. You believe she would have committed the act had there been a policeman at her side?

A. No; I do not believe she would have."

He was cross-examined at some length on the general principles of psychiatry as announced in standard works and he showed substantial agreement with those principles but he was unshaken in his belief as to the sanity of the accused. Nothing in his direct or cross-examination leads me to conclude that he did not well and truly understand and use the criterion. Apparently I am not alone on this conclusion as my associate has not persuasively presented him as one of the experts operating in the area of confusion.

165 I have searched the record of trial rather diligently and I am unable to find any expert who claimed he was confused by the criterion or that he misunderstood its underlying concept. No one at the trial level seemed to have been conscious of any misapplication of the test and all must have considered it in arriving at their conclusions. Those who were asked, testified it was appropriate and accurate, and they apparently used it to their own satisfaction. No one expressed any reservations about its application until after findings and sentence and then the findings brought forth some protests. I, therefore, pass on to consider the post-trial affidavits. Before doing so, I prefer to mention again that the training and qualifications of the five experts who were called as witnesses cause me to wonder how doctors who were so well trained, educated and experienced in the field of psychiatry could misunderstand a basic principle which has long been a cornerstone in determining mental responsibility. As a general observation, I would say, in the light of the education, training and experience of these experts, and from the amount of time they expended in examining this accused, I believe this case is a poor vehicle for supporting a contention that those who testified could not interpret and apply properly the various criteria by which the irresistibility of an impulse may be tested.

There were post-trial affidavits furnished by Doctors Martin,

Graves and Adelson. Dr. Adelson in no way questioned the Technical Manual and he merely corroborated his in-court testimony. At the trial and in his affidavits he stated the accused was suffering from "psychosis, specifically, paranoid schizophrenia." Furthermore, in his post-trial statement he related his disagreement with certain other expert witnesses by saying he could not concur with "a finding of neurotic depression, as that is counter-indicated by the bulk of the data I have gained from the patient's responses, and I am of the opinion that this data was not effectively or intensively examined by the members of the Sanity Board."

166 Dr. Graves' views as expressed in his post-trial statement, can best be stated by quoting part of his affidavit. It provides:

"I should like to make clear to the reviewing authority, that which I apparently did not make clear to the members of the court, that the members of the Sanity Board were, of necessity, governed in making their decisions by the provisions of Air Force Manual 160-42. It has been difficult for me, and I assume for other members of the Board, to clearly express our feelings about this case within the framework of this Air Force Manual. According to the provisions of this Manual, I, as a Psychiatrist, had no choice but to find this individual sane. In the field of psychiatry however, more than in any other field of human knowledge, it is impossible to express the complexities of human behavior in terms of black and white. As a psychiatrist it is my training and my professional function to view all human behavior in its proper shade of grey. I clearly understand that it is the purpose and duty of the members of the court to consider my evaluation of the 'shade of grey' terms. However, it does not follow that because the patient was not insane at the time of the commission of the offence that she must therefore necessarily have been guilty of an [sic] conscious *premeditated* crime. There is, I must state again, no psychiatric evidence of any sort which would lead me to believe that there was sufficient degrees of conscious participation in the planning and execution of this act to refer to it as a premeditated crime. To consider it as such would in my opinion, from considerable knowledge of the past history and personality structure of this person, be a clear cut miscarriage of justice."

I cannot find in that statement any attack on the policeman at the elbow test and the restrictions imposed by the Air Force Manual embrace principles far more important than the illustration of an irresistible impulse given there. As I read this witness' trial testi-

mony, he states unequivocally that the severe-emotional stress under which the accused was laboring only impaired her mental capacity to know right from wrong and adhere to the right. To support his conclusion he used several criteria. His affidavit in no sense undermines his conclusion on partial impairment and its principal attack centers on the finding of premeditation.

Dr. Martin's post-trial affidavit contains no assertions that he misunderstood the Technical Manual and only by asserting that he misunderstood several criteria mentioned by him can that conclusion be reached by the majority opinion. He should be the best witness to his own confusion and as I read the record, I believe he well understands the purpose and intent of the doctrine announced by the Air Force. He does not misunderstand, he just honestly disagrees. He does not say that the policeman at the elbow test is different from a fear of detection test. As a matter of fact he does not mention the latter, but if he is at all familiar with the 1950 Technical Manual, and I must assume he is, he should be well aware that the sentence which specifically deals with the policeman at the elbow test is followed by this statement: "No impulse that can be resisted in the presence of a high risk of detection or apprehension is really very 'irresistible'." Moreover, his enumeration of several different criteria does not mean one is the exact counterpart of the other. More probably he was expressing different rules which he measured his conclusion that the accused did not reach the irresistible impulse stage. He, too, positively testified—and this conclusion is not modified by his subsequent statement—that the mental impairment of the accused was only partial. He might like to escape the principle that a partial impairment does not render the accused mentally irresponsible, but I had thought a range as wide as he probably desires to roam had been narrowed by our decisions in Smith and Kunak. Now I find it is widened by a different method of approach. It may well be that I, in turn, misunderstand his purpose; but, in my opinion, what he is seeking in the way of a principle is this: That if the accused is suffering from a dissociative reaction, and it is not of sufficient severity to deprive her completely of her ability to adhere to the right, the psychiatrist should be permitted to erect his own standards of insanity. He would not testify that Mrs. Covert was psychotic and neither would he testify that her personality breakdown resulted in a total impairment of her capacity to know right from wrong or adhere to the right. He kept her within the area of sanity as we have defined it and yet he would like to remove her. His complaint, closely analyzed, is that a psychiatrist should be permitted to base a conclusion of insanity on his finding that an accused is not fully responsible for his or her behavior.

168 Dr. Martin sums up his belief in his own words and they support my assertion. He displays his desires in the following words:

"All of my feelings about this case can be summed up in the statement that I believe Mrs. Covert was what I would call 'temporarily insane' on the night of 10 March 1953. Since this is a legal and not a psychiatric term, I may have the wrong understanding. The term 'insanity', to me, means that the individual is not responsible for his or her behavior. My understanding of 'temporary insanity' does not make it synonymous with the term 'psychosis'. There are a number of mental or emotional reactions not included in Air Force Manual 160-42 which I could classify as a form of insanity from my understanding of the term that would more adequately describe the condition of Mrs. Covert on the night of 10 March without saying that she was psychotic."

I realize that it is possible to take statements out of context and use them to support a theory, but a fair reading of this record convinces me that confusion concerning certain principles of psychiatry did not exist in the minds of these experts. What I do find in the record is a disagreement in the ultimate conclusions of the experts. The disagreement arises solely over whether Mrs. Covert's depressed reaction had reached such a level that there was a total abrogation of her mental capacity to adhere to the right or whether there was a partial impairment which left her some degree of choice.

Doctors Heisler and Adelson were convinced completely that Mrs. Covert was psychotic and acted as an automaton; that nothing short of physical restraint would have prevented this killing; and that she was legally insane. Doctors Martin and Graves would not go that far as they concluded there was only a partial impairment of the capacity to adhere to the right. They believed that her condition could not be characterized as psychotic and that she was legally sane, but stated that if they were free to use their own standards for sanity, they would find her insane. Dr. Troy stood off by himself as he concluded there was no impairment in her capacity to know right from wrong and adhere to the right and she was sane and could premeditate.

169 In the light of our previous holding, I fail to see how Dr. Graves and Dr. Martin can be freed from some discipline by our pronouncements on psychiatric principles. Both testified that the accused could distinguish right from wrong and adhere to the right. At best they could only find a partial impairment in her mental capacity. However, not only does the Technical Manual set out the principle that partial impairment may not be equated to mental irresponsibility, but the Manual for Courts-Martial,

3. Decn. of USCMA (in dup.) w/mandate.

4. Receipt (in dup.)

(Signed) REGINALD C. HARMON,

Major General, USAF.

The Judge Advocate General,

United States Air Force.

172 EXHIBIT "H" TO RETURN AND ANSWER

Headquarters Command, United States Air Force, Bolling Air Force Base, Washington 25, D. C., 12 July 1955

General Court-Martial Order No. 17

In the general court-martial case of Clarice B. Covert, United States Passport Number 0046309, a person accompanying the Armed Forces of the United States without the continental limits of the United States and the possessions thereof, pursuant to Article 67, the findings of guilty and the sentence as promulgated by General Court-Martial Order No. 14, Headquarters, 7th Air Division, APO 125, c/o Postmaster, New York, New York, dated 22 June 1953, were set aside on 24 June 1955. A rehearing is ordered before another court-martial to be hereafter designated.

BY ORDER OF THE COMMANDER:

N. H. VAN SICKLEN,

Colonel, USAF,

Chief of Staff.

Official:

JOSEPH C. NEWTON,

Major, USAF,

Adjutant,

(ACM 7031).

Distribution: A; X

1 cy Mrs. Clarice B. Cover, Federal Reformatory for Women, Alderson, West Virginia;

1 cy Commander, HEDCOM, USAF, BAFB;

10 cys TJAG, USAF, Hq. USAF, Wash. 25, D. C.;

5 cys Commander, 7th Air Division, APO 125, c/o Postmaster, New York, N. Y.;

2 cys Warden, Federal Reformatory for Women, Alderson, West Virginia;

5 cys AAG, USAF, Hq. USAF, Wash. 25, D. C.;

1 cy GAO, AF Audit Branch, 3800 York Street, Denver, Colorado;

10 cys SJA, HEDCOM, USAF, BAFB;

1 cy CG, 2nd Army, Fort Meade, Maryland.

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EXHIBIT "I" TO RETURN AND ANSWER

13 July 1955

Mr. Don Clemmer
Director, Department of Corrections
District of Columbia
300 Indiana Avenue, N. W.
Washington, D. C.

Dear Mr. Clemmer:

Mrs. Clarice B. Covert was tried and convicted by a military court in England on 29 May 1953 for the offense of murder. She was sentenced by the court to life imprisonment and is presently serving her confinement in the Federal Reformatory for Women, Alderson, West Virginia.

The United States Court of Military Appeals has recently set aside the findings and sentence of the court and have directed a rehearing.

I am charged with the responsibility for the retrial of Mrs. Covert and for her security and custody. It is anticipated that she will be released from the Federal Reformatory and I have requested the warden of that institution to deliver her to my representatives at that time.

There being no suitable custodial facilities for women at any military installation in the Washington, D. C. area, it is requested that you confine her in the District of Columbia Jail, pending her retrial by court-martial at Bolling Air Force Base.

Thanking you for your help in this matter, I am,

Sincerely yours,

STOYTE O. ROSS,
Brigadier General, USAF Commander.

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EXHIBIT "J" TO RETURN AND ANSWER

R. & D. #4

District of Columbia Jail
200 19th Street, S. E.
Washington 3, D. C.

Date July 14, 1955.

Received from the U. S. Military Authorities Department, Washington, D. C., the body of:

CLARICE B. COVERT, W/F

By: CURTIS REID,

For the Superintendent, District Jail, (Signature illegible)

EXHIBIT "K" TO RETURN AND ANSWER

Law Offices

Frederick Bernays Wiener

Suite 815 Stoneleigh Court
1025 Connecticut Avenue, N. W.
Washington 6, D. C.

Telephone District 7-2163

15 July 1955

Commander,
Headquarters Command USAF,
Bolling Air Base,
Washington 25, D. C.

Re: United States v. Mrs. Clarice B. Covert

Sir:

The accused in the above-entitled case is now being held for trial on rehearing following the decision of the U. S. Court of Military Appeals in her case (ACM 7031; USCMA No. 4974).

As counsel for Mrs. Covert, I request that she be examined as to her present mental condition, and that for this purpose she be transferred for observation and examination to a suitable medical installation.

Respectfully,

FREDERICK BERNAYS WIENER,
Counsel for Mrs. Clarice B. Covert.

FBW/dmw

EXHIBIT "L" TO RETURN AND ANSWER

21 Jul. 1955

Department of Health, Education and Welfare
Attention: Dr. Winfred Overholser
Superintendent, Saint Elizabeths Hospital
Washington, D. C.

Dear Dr. Overholser:

This is to confirm the telephone conversation between you and Colonel William H. Ward, Jr., of my office on 19 July 1955. As you know, it is the desire of the Air Force that Mrs. Clarice B. Covert be admitted to Saint Elizabeths Hospital for psychiatric

observation and diagnosis pending disposition of her case by the Air Force.

Mrs. Covert was tried in England by an Air Force general court-martial for the premeditated murder of her husband, Master Sergeant Edward E. Covert. The authority of the Air Force to exercise jurisdiction over Mrs. Covert is contained in Article 2(11) of the Uniform Code of Military Justice (64 Stat. 108; 50 USC, Chap. 22, § 552), as, at the time of the offense, she was accompanying the armed forces outside the continental limits of the United States. Jurisdiction, having lawfully attached, is retained until completion of appellate processes in the case. The United States Court of Military Appeals directed that the record of trial be returned to The Judge Advocate General for rehearing or such other action as is not inconsistent with the Court's conclusions. The case has been forwarded to an officer exercising general court-martial jurisdiction, in this case the Commander, Headquarters Command, Bolling Air Force Base, Washington 25, D. C., for further action not inconsistent with the decision of the United States Court of Military Appeals. That officer is responsible for making the final determination as to whether the charges against Mrs. Covert should be retried or dismissed, and on 12 July 1955 he ordered that a rehearing be held.

As you requested, I have inclosed copies of the decisions of the Board of Review and of the United States Court of Military Appeals in this case. You will note that the Court of Military Appeals determined that the evidence adduced at trial raised the issue of Mrs. Covert's mental responsibility and that error resulted from the failure to instruct the members of the court-martial that they could consider any mental deficiency short of legal insanity in determining the accused's capacity to premeditate. On the

177 other hand, the Board determined that mental impairment short of legal insanity did not constitute a defense to the charge of premeditated murder, nor could such partial mental irresponsibility be considered as affecting the accused's ability to premeditate. Of course, the decision of the Board does not correctly state the law of mental responsibility as it is applied in criminal law today. The decision of the Board, while it does not represent the law of the case, does set out the circumstances attending the commission of the offense and pertinent testimony of the expert witnesses. Thus I believe it will be helpful to you in that respect. It should be noted, too, that the Court of Military Appeals did not merely order the affirmance of findings of guilty of murder without premeditation because a majority felt that the "policeman at the shoulder" test set out in AFM 160-42 was mis-

understood by certain of the expert witnesses. Copies of the manual in effect at the time of the offense and as presently amended are inclosed for your information. In addition, the Staff Judge Advocate, Headquarters Command, has advised that he will make available to you for your assistance in the psychiatric study a copy of the record of trial and all available medical records relating to Mrs. Covert.

The Federal Reformatory for Women, Alderson, West Virginia, was designated as the place of confinement pending completion of appellate review, and on 25 June 1953 Mrs. Covert was committed to that institution. On 14 July 1955, following the receipt of the mandate directing a rehearing or other action not inconsistent with the opinion of the Court of Military Appeals, the Commander, Headquarters Command, Bolling Air Force Base, secured Mrs. Covert's release from the federal reformatory. She was brought to Washington, D. C., and, with the concurrence of the Director, Department of Corrections for the District of Columbia (Mr. Don Clemmer, Deputy Director), was confined in the District of Columbia jail on 14 July 1955. She is presently being retained in that confinement facility awaiting further disposition of her case. Her confinement was ordered under the authority of the Uniform Code of Military Justice, Article 10 (50 USC, Chap. 22, § 564).

In view of the issues raised at trial pertaining to Mrs. Covert's mental responsibility at the time of the offense, and the possibility that further issues may be raised upon the rehearing as to her present sanity or her mental capacity to stand trial, the Commander, Headquarters Command, USAF, has determined that

further psychiatric evaluations will be necessary to assist

178 him in deciding future action in the case. However, the facilities available to the Air Force in this area for conducting an inquiry into her mental condition and providing the necessary restraint incidental thereto, are inadequate. Accordingly, pursuant to the Economy Act of 1932, as amended (31 USC, § 686), it is requested that authority be granted to admit Mrs. Covert to Saint Elizabeths Hospital for a period of 90 days, or such additional period of time as you may deem necessary, for the psychiatric observation and diagnosis. It is further requested that a report of the findings of the psychiatrists be forwarded in quintuplet to the Commander, Headquarters Command, Bolling Air Force Base, Washington, D. C.

Upon approval of Mrs. Covert's transfer to your institution, reimbursement will be effected as provided in the Economy Act. Therefore, a Voucher for Transfers between Appropriations and/or Funds (SF 1080) should be forwarded to the Office of The Surgeon General, USAF, Attention 34.3, Headquarters, United States Air

Force, Washington 25, D. C. when you have determined the amount involved.

Sincerely,

(Signed) REGINALD C. HARMON,

Major General, USAF,

The Judge Advocate General,

United States Air Force

3 Incls.

1. Deen, of B. R. 19 Feb. 54.
 2. Deen, of USCMA, 24 June 55.
 3. AFM 160-42.
- CC. SJA, Bolling AFB.

Coordinated by telephone with General Twitchell who coordinated for General Ogle, Surgeon General. Kuhfeld.

AFCJA-21, Capt. Gobrecht.

AFCJA-21, Col. Ward.

AFCJA-10, Col. Norton.

AFCJA-2, Gen. Kuhfeld.

AFABF-6, Berger, Maj.

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Department of

HEALTH, EDUCATION, AND WELFARE

Saint Elizabeths Hospital

Washington 20, D. C.

Address only The Superintendent, Saint Elizabeths Hospital

July 25, 1955.

Major General Reginald C. Harmon,

The Judge Advocate General,

United States Air Force,

Department of the Air Force,

Washington 25, D. C.

Dear General Harmon:

Receipt is acknowledged of your communication of July 21, 1955 requesting that Mrs. Clarice B. Covert, a prisoner now in the custody of the United States Air Force, be admitted to St. Elizabeths Hospital for psychiatric observation and diagnosis.

I am authorized to approve such transfer, which was effected as of this date, July 25, 1955.

Under the provisions of the Economy Act of 1932 a voucher

(SF 1080) will be forwarded to the Surgeon General of the United States Air Force, Attention 34.3, Headquarters United States Air Force. As yet the per diem rate for the current fiscal year has not been set by the Bureau of the Budget and the voucher therefore will not be forwarded until later. However, based on current information, the cost of 90 days' care should be about \$485.00. It is understood that Mrs. Covert is admitted to this hospital for a period not exceeding 90 days unless an additional period is deemed necessary for psychiatric observation and diagnosis.

Report of the findings of the psychiatrists will be forwarded as you request in triplicate to the Commander of the Headquarters Command, Bolling Air Force Base.

Sincerely yours,

WINFRED OVERHOLSER, M. D.,
Superintendent.

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EXHIBIT "M" TO RETURN AND ANSWER

TC: The prosecution requests the court to take judicial notice of Third Air Force Regulation 111-2 and 111-2A, dated 16 September 1952 and 9 October, 1952 respectively, in general, and specifically paragraphs 1, 2 and 4, subparagraphs a, b and c.

DC: No objection, provided they are attached as appellate exhibits.

LO: The regulations requested will be marked as Appellate Exhibit No. 5. The court will take judicial notice of these regulations and their contents. They will be attached to the record as Appellate Exhibit 5.

TC: Prosecution requests permission to read to the court the specific paragraphs referred to in Appellate Exhibit 5 and request they take judicial notice thereof.

LO: They may be read.

TC: The regulation is entitled Military Justice, The United States of America (Visiting Forces Act 1942):

1. *Purpose.* The purpose of this regulation is to outline the laws of the United Kingdom facilitating U. S. Courts-martial jurisdiction.

2. *Scope.* The United Kingdom laws outlined in this regulation are applicable to all civilian and military personnel and their dependents under the jurisdiction of the Third Air Force and 7th Air Division.

4. *USA Visiting Forces Act, 1942* (5 & 6 Geo. 6, Ch. 31, 6 August 1942). This Act of Parliament surrenders to the United

States military authorities and courts-martial the jurisdiction of the courts of the United Kingdom in *criminal* cases. It is now the sole responsibility of this command to try and, on conviction, punish all criminal offenses which members of this command may be alleged, on sufficient evidence, to have committed in the United Kingdom. The following are pertinent provisions of that Act:

181 a. *US Forces Not to be Prosecuted in United Kingdom*

Courts. Section 1 of this statute is as follows: 'Subject as hereinafter provided no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America: Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.'

b. *Definition of US Forces:* Section 2(1) of this statute is as follows: 'For the purpose of this act and of the Allied Forces Act 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces: Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom.'

c. *Method of Proving Membership in US Forces.* Section 2(2), (3) and (4) of this statute are as follows: '(2) For the purposes of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may be appointed for the purpose by the Government of the United States of America stating that a person of the name and description specified in the certificate is, or was at the time so specified subject to the military or naval law of the United States of America, shall be conclusive evidence of that fact. Such certificate will be issued only by an officer of field grade or above. (3) For the purposes of any proceedings in any court of the United Kingdom in which the question is

182 raised whether a party to the proceedings is, or was at any time, a member of the military or naval forces of the United States of America, any such certificate as aforesaid relating to a person bearing the name in which that party is charged or appears in the proceedings shall, unless the contrary is proved, be deemed to relate to that party. (4) Any document purport-

ing to be a certificate issued for the purposes of this section and to be signed by or on behalf of an authority described as appointed by or on behalf of an authority described as appointed by the Government of the United States of America for the purposes of this section, shall be received in evidence and shall, unless the contrary is proved, be deemed to be a certificate issued by or on behalf of an authority so appointed."

The prosecution requests permission to read to the court Prosecution Exhibit No. 7.

LO: You may read it.

TC: (Reading)

"HEADQUARTERS
3918th AIR BASE GROUP
RAF STATION UPPER HEYFORD
OXON, ENGLAND

11 March 1953.

CERTIFICATE

Pursuant to paragraph 4b, Third Air Force Regulation 141-2 (Visiting Forces Act of 1942), I certify that Mrs. Clarice B. Covert comes within the provisions of the UCMJ, MCM, US 1951, and further she is subject to Military Law of the United States Armed Forces.

US Passport—00463309, issued at Washington, D. C., United States of America.

Alien's Registration Certificate—A495066, issued at Bicester, Oxon, c/a 31 July 1952.

(Signed) ALVAN C. GILLEM,

(Typed) ALVAN C. GILLEM,

Colonel, USAF,

Commanding.

183-184 The prosecution calls as its next witness Sergeant Buckingham. RALPH BUCKINGHAM was called as a witness for the prosecution, was sworn and testified as follows:

DIRECT EXAMINATION

Questions by the prosecution:

Q. Will you state your full name, your occupation and residence?

A. Ralph Buckingham, Superintendent of Police, stationed at Banbury, Oxfordshire.

Q. Sergeant Buckingham, do you know the accused in this case?

A. I do not, sir.

Q. Sergeant Buckingham, I direct your attention to on or about

the 11th of March, 1953, and ask you whether or not on that occasion you had an opportunity to have a conversation with Colonel Gillem of the 3918th Air Base Group, RAF Station Upper Heyford?

A. I did.

Q. Will you tell the court the circumstances surrounding that conversation?

A. It had been reported to me that a death had occurred at the Air Force station Upper Heyford, and it was suspected murder. I went to the station at Upper Heyford, and there I made certain inquiries and, in consequence of that, I had a conversation with Colonel Gillem, and the outcome of the conversation was that Colonel Gillem issued a certificate under the relevant sections of the Visiting Forces Act, to the effect that the accused was subject to United States military law.

Q. Sergeant Buckingham, I show you what has been marked Prosecution Exhibit No. 7 and ask you if you know what it is?

A. That is the certificate given to me by Colonel Gillem on the 11th of March, 1953, certifying that the accused was subject to United States military law.

Q. Was this certificate then accepted by you or your superiors?

A. It was. It was accepted by me for my chief constable.

Q. And who is your chief constable?

A. Mr. Rutherford.

Q. Sergeant Buckingham, I ask you whether or not then, the British police authorities took any further action in the case of Clarice B. Covert upon your acceptance of the certificate, Prosecution Exhibit No. 7, signed by Alvan C. Gillem?

A. We took no further action and handed over jurisdiction to the United States military forces.

185 In the United States District Court for the District of Columbia

RULING OF THE COURT—November 22, 1955

The Court: In the present case, the petitioner while residing with her husband, a member of the United States Air Force in England, took the life of her husband and, of course, was subject to court martial under the provisions of Section 551 of Title 50 of the United States Code, the Air Force taking the position that this petitioner was a person accompanying the armed services abroad within the terms of this provision of the Code.

The case raises the very interesting question again of whether this petitioner as a civilian is entitled to the constitutional guarantees of the Fifth and Sixth Amendments or whether she was properly tried by court martial.

The Fifth Amendment, of course, exempts from its provision

as to due process those cases arising in the land or naval forces. The law appeared, until a few weeks ago, to have been rather definitely settled as to what constituted a case arising within the armed or naval forces, but the decision of the Supreme Court of the United States in the case of the United States of America, ex rel. Audrey M. Toth, petitioner, vs. Donald A. Quarles, Secretary of the Air Force, decided on November 7, 1955, has virtually turned inside out a great many earlier decisions especially in Courts of Appeal and in United States District Courts.

186 It is true that the Toth case on several occasions refers specifically to the fact that Toth was an ex-soldier. He is described as a civilian ex-soldier. But the teaching of the case insofar as it relates to the right of the person to his constitutional guarantees in the face of court martial charges is that Toth was a civilian.

It does seem to this Court that the significant phraseology of the Toth case must be predicated upon the understanding that the Supreme Court is dealing with the rights of a civilian. The Supreme Court has decided that a civilian, even though he was in the military service at the time he committed a crime, is entitled to a trial by the civil courts. In short, the Supreme Court says—a civilian is entitled to a civilian trial.

Applying this principle to the present case, the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding.

The Court recognizes that there are great difficulties inherent in the Court's ruling today, because admittedly the military services have major and difficult problems in dealing not only with the civilians attached in official capacities but with the civilians who are members of the families of the armed forces on foreign stations.

187 I do believe that the problem created is one which is of ready solution by the Congress. There appears to be no difficulty in enacting statutes which would confer upon the District Courts of the United States the jurisdiction to try cases arising on these foreign stations in the same manner that crimes on the high seas are tried at the present time.

It seems that the Congress could legally declare that a civilian could be tried in the first jurisdiction in which the civilian is brought or in the jurisdiction where the civilian is found, in the same manner that the statutes now provide for this type of jurisdiction in cases involving crimes on the high seas.

I don't think the Court's observations in this regard are essential to its disposition of the present case. The Court will grant the writ in the present case.

188 Mr. WIENER: If your Honor please, I have the draft of the order here which is modeled after a recess ruling by Judge Goodman in the Northern District of California, where in a similar case he said:

In view of the Army's clear lack of jurisdiction to court-martial petitioner for the offense charged, and the exceptional circumstances noted, the writ of habeas corpus will issue. Inasmuch as the relevant facts are not disputed and the legal issue was fully argued upon the hearing of the order to show cause and thereafter briefed, & return to the writ and a further hearing are unnecessary."

I have drafted an order to submit to your Honor along those lines and the only point that has to be noted is the bond. This is an appealable order.

The bond in the Toth case was \$1,000 and I suggest that that would be appropriate here.

The COURT: Mr. Burka, do you have any views about the form of this order?

Mr. BURKA: Your Honor, I have no objection to the order as such. I believe that under your Honor's ruling the Government should agree thereto.

However, in the matter of bond, this is, in civilian life, a
189 question of first degree murder, premeditated murder. We feel that a bond in the sum of \$1,000 is perhaps too small. We would suggest it be higher in the discretion of the Court.

The COURT: What do you say is a reasonable bond, Mr. Burka?

Mr. BURKA: May I confer with my colleagues?

Mr. WIENER: In the——

The COURT: I will hear you in just a minute.

Mr. BURKA: We would recommend \$5,000, your Honor.

Mr. WIENER: I mentioned \$1,000 because that is what it was in the Toth case and, after all, this isn't bail. This is a bond. This is really an appeal bond.

Mr. BURKA: I agree, your Honor. If that was the bond set in the Toth case I agree with that.

The COURT: I think \$1,000 bond is adequate in this case. I don't know the economic circumstances of the petitioner. I did observe in reading the transcript of the proceedings before the Military Court of Appeals last night that one of the factors of causation of the petitioner's alleged mental or emotional disturbance was the fact that she was about to inherit some type of estate, and there was a dispute as to whether it would be saved for the education of the children or spent in a tour of the continent with her husband.

190 I think a \$1,000 bond is adequate in this case.

Mr. BURKA: The estate, I understand and although it has

no hearing on the bond, and I agree that a \$1,000 bond would be sufficient, it is my understanding that it was around \$40,000.

Mr. WIENER: That is my information.

(Thereupon the instant hearing was concluded.)

191 [File endorsement omitted]

In the United States District Court for the District of Columbia
Habeas Corpus No. 87-55

UNITED STATES OF AMERICA on the relation of CLARICE B. COVERT

v.

CURTIS REID, Superintendent of the District of Columbia Jail

JUDGMENT OF RELEASE AND DISCHARGE—November 22, 1955

Upon consideration of the Petition for a Writ of Habeas Corpus, the Order directing Respondent to Show Cause, and Respondent's Return and Answer Thereto, and the briefs of both parties and argument of counsel in open court; it is by the Court, this 22nd day of November 1955,

ORDERED, That the writ of habeas corpus issue as prayed for;

FURTHER ORDERED, That, inasmuch as the relevant facts are not disputed and the legal issue was fully argued upon the hearing on the Order directing Respondent to Show Cause, a return to the writ and a further hearing are unnecessary;

FURTHER ORDERED, That the relator, CLARICE B. COVERT, be, and she hereby is, released from the custody of the respondent; *Provided, however*, that the said CLARICE B. COVERT post a bond in the sum of One Thousand Dollars (\$1,000.00) cash or bond, with the surety approved by the Clerk of this Court, conditioned upon her appearance before this Court at the conclusion of the appeal which may be taken by the respondent herein.

EDWARD A. TAMM,

United States District Judge.

• Seen:

ALFRED BURKA,

Attorney for the Respondent.

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[File endorsement omitted]

In the United States District Court for the District of Columbia

[Title omitted]

NOTICE OF APPEAL—Filed December 22, 1955

(a)

Comes now the Respondent by his attorney, the United States Attorney, and hereby notes this direct appeal to The Supreme Court of the United States; the judgment appealed from is the judgment of this Honorable Court, dated the 22nd day of November, 1955, ordering that the Writ of Habeas Corpus issue as prayed for and, further ordering that the relator, Clarice B. Covert, be and she hereby is released from custody of the Respondent; the said Order was dated the 22nd day of November, 1955, and was entered by this Court on that date; the statute under which this direct appeal is taken is, Title 28, U. S. C. Section 1252; the case involved is a Habeas Corpus case wherein the petitioner had been convicted by Military Court convened in England of the offense of murder and had received a life sentence; temporarily petitioner was in the custody of Respondent as Superintendent of the D. C. Jail pending retrial of the offense with which she is charged by the Military authorities at Bolling Field, D. C.

(b)

Respondent designates the following portions of the record to be certified by the Clerk of the United States District Court for the District of Columbia to The Supreme Court of the United States:

- 193 1. Petition for Habeas Corpus.
2. An Order to show cause issued thereupon.
3. Respondent's return and answer, including exhibits filed therewith.
4. Reporter's transcript of the Opinion of the Court.
5. Judgment of release and discharge signed November 22, 1955.
6. This Notice of Appeal.

(c)

The question presented is whether Article 2 (11) of the Uniform Code of Military Justice, also cited as Section 552 (11) of Title 50 of the U. S. Code which authorizes trial by court-martial of

civilians serving with or accompanying the Armed Forces overseas is unconstitutional.

LEO A. ROVER,
United States Attorney.

OLIVER GASCH,
Principal Asst. to U. S. Attorney.

ALFRED BURKA,
Asst. United States Attorney.

CERTIFICATION

This is to certify that a copy of the foregoing Notice of Appeal was served on counsel for the Respondent, Frederick Bernays Wiener, Esquire, 1025 Conn. Ave., N. W., Washington, D. C., this 22nd day of December, 1955, by United States Mail.

OLIVER GASCH,
Principal Asst. to U. S. Attorney.

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[File endorsement omitted]

In the United States District Court for the District of Columbia.

[Title omitted]

~~STIPULATION FOR ADDITION TO RECORD~~—Filed January 10, 1956

It is hereby stipulated, by and between the parties to the above-entitled cause, that the exhibit introduced on behalf of the respondent herein at the hearing of this cause on November 22, 1955, being the copy of the original record of trial of the relator by a general court-martial of the United States Air Force, is to be regarded as supplemented by the attached copies of the three post-trial affidavits, all of which were considered by the Board of Review of the United States Air Force, as is more particularly set forth in the opinions rendered in said Board, which said opinions are Exhibit C to the respondent's return in this case; all of which were likewise considered by the United States Court of Military Appeals, as is more particularly set forth in the opinions rendered in said Court, which said opinions are Exhibit F to the respondent's return in this case; and which affidavits are more particularly described as follows:

1. Affidavit of Captain Nathan R. Adelson, USAF, verified June 17, 1953.

2. Affidavit of Captain James H. Graves, USAF, verified June 10, 1953.

195 3. Affidavit of Lieutenant Colonel Richard L. Martin, USAF, verified June 10, 1953.

It is further stipulated, by and between the parties to the above-entitled cause, that the attached three affidavits shall have the same force and effect as though they had been included within and as a part of said record of trial by general court-martial at the time said record of trial was offered as an exhibit in this cause.

Dated this 10th day of January, 1956.

FREDERICK BERNAYS WIENER,

1025 Connecticut Avenue, N. W.,

Washington 6, D. C.,

Attorney for the Relator.

LEO A. ROVER,

United States Attorney.

OLIVER GASCH,

Principal Asst. to U. S. Attorney.

ALFRED BURKA,

Asst. U. S. Attorney.

Attorneys for the Respondent.

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AFFIDAVIT

To Whom It May Concern:

I, Captain Nathan R. Adelsohn, 5th General Hospital, Burderop Park, England, having been requested by the Defense Counsel in the General Court-Martial case of the United States v. Mrs. Clarice B. Covert to present the substance of the tests which I gave Mrs. Covert and from which I reached a diagnosis as to her mental responsibility on the night of 10 March 1953 and having been duly sworn do hereby state under oath:

That I am the same Captain Adelsohn who testified at the General Court-Martial case which convicted Mrs. Covert of premeditated murder.

I first tested Mrs. Clarice Covert on 12 March. The tests I used were:

1. *Wechsler-Bellevue Scale*. This test is not only a measure of intelligence, but is also a valuable clinical diagnostic tool. From a study of a person's responses on this test it is possible to draw certain inferences about a patient and about her mental functioning. It also gives information as to a patient's mental functioning in comparison with the mental functioning of others, whether they be normal, psychotic, or other. It is also possible to draw inferences regarding her present mental functioning in comparison with past level of functioning. To explain this briefly, it has been found that whenever there is a falling off in mental functioning—

as in mental disease—this falling off is not uniformly even, but effects certain areas more severely than other areas.

This test consists of eleven Sub-tests, comprising roughly 180 separate items. Similarly, the other tests to be discussed below call for large numbers of responses; for example the *Minnesota Multiphasic Personality Inventory* has 550 items. An analysis of a patient's performance in each of the Sub-tests and a further analysis of her performance on each of the items makes it possible to comment upon her mental level at the time of testing in comparison with her functioning at a previous period.

The findings of this test revealed Mrs. Covert was well informed. Generally good judgment was also evidenced. An analysis of this judgment, however, showed that it was good in connection with matters of no personal concern to her, but that the judgment was poor in matters involving personal values. She shows perceptual distortion, i.e., difficulty in seeing items in pictures placed before her, and at times assumed that things were there, which objectively were *not* there. This is evidenced most clearly on the Picture Completion and Picture Arrangement Sub-tests. It should be noted that the perceptual distortion is not characteristic of normal performance, i.e., mentally normal people do not distort things they see to a significant degree. Neurotics often do distort things they see, but usually to only a small degree. Only where there is a major upheaval as in organic brain damage or in psychosis is there a severe perceptual distortion. The distortion found here was severe and clearly of an order which is regularly classed as psychotic.

Evidence is also found of paranoid ideas which will be discussed more fully in connection with another test below. Severe difficulty in concentration was also evidenced, and marked impairment of her analytic-synthetic thought processes. The latter is evidenced most clearly by the almost complete failure on the Block Designs Sub-test, beyond a degree found with most severe neurotics. There is also marked impairment of ability to grasp relationships, or deduce the common element between related things. This attests also to an impairment of ability to profit to a normal degree from past experience.

197. Also found in this test was strong evidence of depression.

On tasks which she can master quickly, without great effort, she is normally successful, however, tasks requiring immediate directed effort and perseverance, she fails.

An analysis of the pattern of Sub-tests scores also was consistent with that of a schizophrenic picture. This diagnosis is consistent with data presented by the author of this test and by consensus of findings by psychologists in the twenty years during which this standardized test has been used.

2. *Wechsler-Bellevue Scale Re-test*. On 23 April 1953 at the request of Captain Heisler, the undersigned re-tested Mrs. Covert using Form II of the Wechsler-Bellevue Scale, which is an alternate form of the test described above in Section 1. The findings were substantially the same. In only two of the eleven Sub-tests was there appreciable change, i.e., in areas in which she did well on the first test, she also did well upon re-test, and visa-versa.

3. *Bender-Gestalt Test*—suggests presence of psychosis, probably depressive.

4. *H-T-P and Machover Tests*—findings indeterminate as to neurosis or psychosis, though severity of disturbance is strongly suggested, and this in turn suggests psychotic rather than neurotic diagnosis.

5. *Rorschach Test*. Psychosis is most probable explanation for her performance here, though it is borderline, with many life-long neurotic features in evidence. Predominant, however, were evidences of "freezing" of her emotional life, and a basic seclusiveness and need to withdraw from people. These tendencies are narcissistic in character and suggest psychotic or near-psychotic level of adjustment, rather than neurosis. Very important also are strong evidences of paranoid ideas. These, in combination with the above findings, suggest paranoid schizophrenic diagnosis. Much insight into the structure of her personality which was obtained from this test must be omitted here, but is reflected in the final conclusions of the undersigned.

6. *Thematic Apperception Test*—gave considerable information regarding her conflicts in living. Clear evidence is obtained of the fluidity of her transference reactions, e.g., her great readiness to see husband as father, her children as herself when younger, etc. Diagnostic differentiation is not facilitated directly by use of this test, but was valuable in arriving at a rounded understanding of the patient's personality.

7. *Sentence Completion Tests*—as in the test immediately above, these tests were not of value for diagnostic differentiation, but only for understanding the patient's unconscious motivations.

8. *Cornell Index*. The Index of 54 suggests major order of disturbance.

9. *Minnesota Multiphasic Personality Inventory*. The pattern secured by her responses on this test, when plotted graphically, shows two outstanding trends: Depression and Schizophrenia. While this examiner places limited confidence in this test because of possibility of falsification on this questionnaire-type test, the fact remains that the "Lie" score is low. This score, which is part of the test, evaluates a patient's tendency to falsify. The low "Lie" score suggests an honest approach. This has been confirmed by no less than 40 hours work with this patient to date.

On this test the patient is asked to respond to each of 550 statements as being *True*, *False* or *Cannot Say*, as applied to herself.

198 I shall set down here several of the noteworthy responses, as follows:

Item H-4. "I believe I am being followed." (True)

Item H-2. "I have often felt that strangers were looking at me critically." (True)

Item H-3. "I am sure I am being talked about." (True)

Item H-1. "I am bothered by people outside, on street cars, in stores, etc., watching me." (True)

Item G-52. "I have no enemies who really wish to harm me." (False)

Item H-8. "At one or more times in my life I felt that someone was making me do things by hypnotizing me." (True)

Item H-51. "Whenever possible I avoid being in a crowd." (True)

There are numerous other evidences of paranoid fears. These are but a few: Some such feelings are experienced by normals, more by neurotics, but here there are so many as to strongly suggest psychosis. There are also evidences of dissociative tendencies, such as:

Item A-20. "I have had attacks in which I could not control my movements or speech but in which I knew what was going on around me." (True)

Item A-21. "I have had blank spells in which my activities were interrupted and I did not know what was going on around me." (True)

Item H-12. "I have had very peculiar and strange experiences." (True)

Item A-50. "Some people are so bossy that I feel like doing the opposite of what they request; even though I know they are right." (True)

This item suggests dissociation or unawareness of hostility, i.e., hostility comes out unconsciously; rarely, if ever, consciously. This suggests the unconscious motivation and nature of the fatal act—or to say it another way—there was probably an unconsciousness of just what she was doing. The awareness of all five members of the Neuropsychiatric Staff of the cloudedness of her consciousness is

what made for the unanimity on this point: viz., that the act was not premeditated.

10. *Goldstein-Scheerer Cube Test.* This test was administered 23 April 1953, after the re-test with the Wechsler-Bellevue Scale Form II. The examiner originally did not plan to use this test, but it was given for this reason: the patient's performance on the Cube (or Block Designs) Sub-test of the Wechsler-Bellevue had been so extremely poor as to suggest major impairment of thought, such as could not possibly be explained as neurotic, even on the most severe order—and I desired to study this area more intensively. If there would be failure here, a neurotic diagnosis would have to be rejected. If she succeeded, one would know but little more than was known before. There was failure. One might say this was an "either—or" test. The result of the test was crucial and unequivocal. It established the absence of an essential component for normal thought processes required in everyday living. (To the best of my knowledge, the result of this test was discussed briefly with only one member of the Sanity Board—Captain Graves).

199. The patient unquestionably did not malingering. (The possibility of malingering had been considered but in the final analysis was rejected.) The patient went through an emotional agony in trying to reproduce these elementary designs, but she failed over-and-again. When designs with guide lines were used she succeeded. When the designs without guide lines were used again, she continually failed.

The day before preparing this affidavit, the undersigned obtained for the first time the patient's hospital chart and found under "Nursing Notes", dated 24 April 0730 hours, the following entry: "Complaining severe headache, tearful, agitated. Is concerned over her psychological tests. 'I couldn't put those blocks together! A two-yr. old child can do that! What's the matter with me? Is my brain dead? - - -!'"

Based on the various tests given Mrs. Covert, I have reached a diagnosis as to her mental condition on the night of 10 March 1953 which is: psychosis, specifically, paranoid schizophrenia.

In my clinical interviews with this patient, preceding and following the testing, I was impressed with the psychotic depressive features present, and I can understand how clinical interviews could result in the diagnosis of psychotic depression. It appears to me, however, that the diagnosis of paranoid schizophrenia takes into consideration more adequately the narcissistic, seclusive, schizoid, and paranoid features present, which sometimes are more pronounced in testing than in interview. In either case, psychosis, meaning—I presume—legal irresponsibility, seems to me to have been clearly present. I disagree with a finding of neurotic depression, as that is counterindicated by the bulk of the data I have

gained from the patient's responses, and I am of the opinion that this data was not effectively or intensively examined by the members of the Sanity Board.

Witness my signature this the 17th day of June 1953.

(S.) NATHAN R. ADELSON.

Sworn to and subscribed before me, the undersigned authority, this the 17th day of June 1953.

(S.) GEORGE J. SCHWEIZER, JR.,

Major, USAF,
Judge Advocate.

200

AFFIDAVIT

To whom it may concern:

I, Captain James H. Graves, 5th Hospital Group, Burderop Park, England, have been duly sworn and do hereby state under oath; that I am the same Doctor Graves who was a member of the Sanity Board which inquired into the mental condition of Mrs. Clarice B. Covert and who testified at the general Court-Martial case which convicted Mrs. Clarice B. Covert of premeditated murder; that I am making this Affidavit for whatever value it may be to the reviewing authority without solicitation on the part of the defense counsel and entirely because from my knowledge of the case, the findings of the general court martial are in error. I feel that in some essential sense the meaning of the medical testimony as given by myself (and presumably by other members of the Sanity Board) was not sufficiently clear to the members of the court to enable them to reach a verdict consonant with the medical facts in the case.

I should like to make clear to the reviewing authority, that which I apparently did not make clear to the members of the court, that the members of the Sanity Board were, of necessity, governed in making their decisions by the provisions of Air Force Manual 160-42. It has been difficult for me, and I assume for other members of the Board, to clearly express our feelings about this case within the framework of this Air Force Manual. According to the provisions of this Manual, I, as a Psychiatrist, had no choice but to find this individual sane. In the field of psychiatry, however, more than in any other field of human knowledge, it is impossible to express the complexities of human behavior in terms of black and white. As a psychiatrist it is my training and my professional function to view all human behavior in its proper shade of grey. I clearly understand that it is the purpose and duty of the members of the court to consider my evaluation of the "shade of grey" terms. However, it does not follow that because the patient was not insane at the time of the commission of the offence that she must therefore necessarily have been guilty of an conscious premeditated crime.

There is, I must state again, no psychiatric evidence of any sort which would lead me to believe that there was sufficient degree of conscious participation in the planning and execution of this act to refer to it as a premeditated crime. To consider it as such would in my opinion, from considerable knowledge of the past history and personality structure of this person, be a clear cut miscarriage of justice.

Witness my signature this 10th day of June 1953.

(S.) JAMES H. GRAVES,
(T.) JAMES H. GRAVES,
Captain, USAF (MC).

Sworn and subscribed to before me, the undersigned authority, this the 10th day of June 1953.

(S.) ROSS A. WARD,
(T.) ROSS A. WARD,
Major, USAF (MSC),
Adjutant, 5th Hosp. Gp.,
APO 232.

201

AFFIDAVIT

To whom it may concern:

I, Lieutenant Colonel Richard L. Martin, 5th General Hospital, Burderop Park, England, having been duly sworn do hereby state under oath:

That I am the same Doctor Martin who was President of the Sanity Board which inquired into the mental condition of Mrs. Clarice B. Covert and who testified in the General Court-Martial case which convicted Mrs. Clarice B. Covert of premeditated murder; that I am making this affidavit, for whatever value it may be to the reviewing authority, without solicitation on the part of the defense counsel and entirely because from my knowledge of the case, and I believe few people know more about the case than I do, the findings of the General Court-Martial are completely wrong. I can only conclude that the court's findings was either reached without consideration of the medical testimony or that the medical testimony presented an inadequate picture. Since there may have been legal technicalities which prevented my testifying in detail as to my understanding of the case, I desire at this time to set forth my views in more detail.

I believe that Air Force Manual 160-42 is far too limited in its scope to include all necessary cases in psychiatry and hindered the Sanity Board in reaching a finding that adequately expressed the true condition of Mrs. Covert on the night of 10 March 1953. Her case is one which, in my opinion, most psychiatrists would agree

would not fall within the scope of this Manual. The Manual makes it impossible to explain Mrs. Covert's lack of ability to adhere to the right in regard to the particular offense charged as an irresistible impulse because of one limitation: we could not say that she would have carried out the act if a civilian authority had been there. If that strong limitation had not been present, her condition could be explained as an irresistible impulse. Within the limitations of the Manual, I feel that her condition could better be explained, as I testified, as being a dissociative reaction. As explained in the Manual, an acute case of such reaction results in a personality (ego) disorganization that permits the anxiety to overwhelm and momentarily govern the total individual and that this occurs with little or no participation on the part of the conscious personality. This is what I believe happened in Mrs. Covert's case. In such cases as these, as is well known, a person may be brought out of an acute state of dissociative reaction by shock as simple as being slapped in the face. In this connection, I believe that the reaction through which Mrs. Covert went on the night of 10 March was such that the appearance of a civil authority at her side would have been equivalent to the slap in the face and that she probably would not have carried out the alleged act. The same probably would have been true if her children would have come into the room. But none of these things happened and she remained in a dissociated state until she had taken the sedatives and fallen to sleep. It should further be explained that a dissociative reaction is not necessarily a momentarily thin- and it may last for some time as long as no outside stimulant shocks the individual back to normal. The fact that she took the time to go down stairs to get the ax, therefore, does not rule out this diagnosis and does not mean that the act was consciously controlled.

202-204 The fact that the defendant has some memory for what actually happened is not an indication that the act was consciously carried out. Many very severe psychotics who have been psychotic for some time and recover may have complete memory for everything that happened and all of their behaviors during the psychotic period. In this connection, many persons with an irresistible impulse as defined in Air Force Manual 160-42 may have memory for the act but are still unable to avoid carrying out the act.

All of my feelings about this case can be summed up in the statement that I believe Mrs. Covert was what I would call "temporarily insane" on the night of 10 March 1953. Since this is a legal and not a psychiatric term, I may have the wrong understanding. The term "insanity", to me, means that the individual is not responsible for his or her behavior. My understanding of "temporary insanity" does not make it synonymous with the term "psychosis".

There are a number of mental or emotional reactions not included in Air Force Manual 160-42 which I could classify as a form of insanity from my understanding of the term that would more adequately describe the condition of Mrs. Covert on the night of 10 March without saying that she was psychotic.

I would like to add that from my knowledge of Mrs. Covert and the information gained by Doctor Heisler in his examinations of her that I am completely convinced that what she has related to us has been the entire truth. I am also of the opinion that confinement for any extensive period of time would do more harm than good in view of what I consider her true mental condition to have been on the night of 10 March and her present mental state.

Witness my signature this the 10th day of June 1953

(S.) RICHARD L. MARTIN

(T.) RICHARD L. MARTIN

Lt. Col. USAF

Sworn and subscribed to before me, the undersigned authority, this the 10th day of June 1953.

(S.) ROSS A. WARD

(T.) ROSS A. WARD

Major, USAF (MSC)

19451A

Adjutant, 5th Hosp. Gp., APO 232

205 Clerk's Certificate to foregoing transcript omitted in printing

206 Supreme Court of the United States

[Title omitted]

ORDER POSTPONING CONSIDERATION OF JURISDICTION March 12, 1956

APPEAL from the United States District Court for the District of Columbia.

The statement of jurisdiction and the motion to dismiss or affirm in this case having been submitted and considered by the Court, further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits. The case is transferred to the summary calendar.

March 12, 1956.

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. —

CURTIS REID, SUPERINTENDENT OF THE DISTRICT
OF COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLUMBIA

STATEMENT AS TO JURISDICTION

OPINION BELOW

The opinion of the District Court granting the writ of habeas corpus has not been reported. A copy is annexed hereto as Appendix A.

JURISDICTION

On November 22, 1955, the District Court for the District of Columbia entered an order granting the relator (appellee here) a writ of habeas corpus and ordering her discharge from the custody of the respondent (appellant here). A notice of appeal to this Court was filed in the

District Court on December 22, 1955. The jurisdiction of this Court to review on direct appeal the decision of the District Court, granting the writ of habeas corpus on the ground that the Act of Congress under which the appellee was being held for retrial by court-martial is unconstitutional, is conferred by 28 U. S. C. 1252.

STATUTE INVOLVED

50 U. S. C. 552, 64 Stat. 109, Article 2 of the Uniform Code of Military Justice, provides in pertinent part:

§ 552. PERSONS SUBJECT TO THIS CHAPTER (ARTICLE 2).

The following persons are subject to this chapter:

* * * * *

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands * * *

QUESTION PRESENTED

Whether Congress has power under the Constitution to confer jurisdiction on a court-martial

to try a dependent wife of a member of the United States Air Force, residing in public quarters on the air base in England at which her husband was stationed, for the crime of murder committed by her within the confines of the air base in England.

STATEMENT

The appellee was tried by court-martial at a United States Air Force base in England for the murder of her husband, an Air Force sergeant, on or about March 10, 1953, at a United States Air Force base in England. She was convicted and sentenced to imprisonment for life. Her conviction was affirmed by the Board of Review. On review by the Court of Military Appeals of issues with respect to the evidence and instructions regarding insanity, the conviction was set aside and a rehearing directed, if practicable.

In affirming the conviction, the Board of Review found that appellee was a person accompanying the armed forces without the continental limits of the United States and within the ambit of Article 2 (11) of the Uniform Code of Military Justice, *supra*. Evidence introduced at the trial established that appellee and her children had been brought to England via military service transport at government expense on application by her husband pursuant to permission granted by the Commanding General, Third Air Force. She and her husband had been assigned to public quarters on the base. She was authorized to use the facilities of the Commissary and Post Ex-

change, and was entitled to receive, and did receive, medical treatment at the United States Air Force facilities at the base.

The Board of Review also noted that at the time of the commission of the alleged offense there was in existence the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. VI, Ch. 31) (Appendix C, *infra*, pp. 17a-21a) effectuating an agreement between the Government of the United States of America and His Majesty's Government in the United Kingdom, which related to jurisdiction over members of the military and naval forces of the United States. In accordance with the provisions of that Act, the United States Base Commander executed an appropriate certificate which was delivered to an authorized representative of the British Government, setting forth that the accused was on March 10, 1953, a person subject to the military laws of the United States, and thereafter no action was taken in respect to the accused by British authorities.

Following her conviction by the general court-martial in England, appellee was confined in the Federal Reformatory for Women, Alderson, West Virginia. After the conviction was set aside by the Court of Military Appeals, a retrial was ordered by a court-martial convened at the Bolling Air Force Base, and appellee was transferred to Washington, D. C. There being no suitable custodial facilities for women at any military instal-

lation in the Washington area, she was confined in the District of Columbia jail on July 14, 1955.

On November 17, 1955, appellee filed, in the United States District Court for the District of Columbia, a petition for a writ of habeas corpus challenging the validity of her detention on the ground that she was not subject to court-martial jurisdiction. An order to show cause issued, and on November 22, 1955, the District Court, after hearing argument, entered an order granting the writ of habeas corpus. It ruled that under the principles of *Toth v. Quarles*, 350 U. S. 11, "the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding."

THE QUESTION IS SUBSTANTIAL

Article 2 (11) of the Uniform Code of Military Justice (*supra*, p. 2) confers authority upon courts-martial of the armed forces of the United States to try persons serving with, employed by, or accompanying those forces without the continental limits of the United States and certain of its territories. The general court-martial which tried appellee for the murder of her husband, committed on a United States Air Force base in England, claimed authority to do so by virtue of Article 2 (11). In granting appellee's petition for a writ of habeas corpus, the District Court

for the District of Columbia ruled that Congress had no constitutional power to authorize courts-martial to try civilians accompanying the armed forces for crimes committed without the continental limits of the United States and certain of its territories.

The question presented by this case is of prime importance in view of military and political developments, both in this country and abroad, since the end of World War II. Elements of the military and naval establishments of the United States, which must be maintained to meet the nation's commitments and to insure our national security, are now located in many friendly foreign nations. In order to preserve the morale of forces stationed outside the United States and to encourage recruitment of new personnel, the military and naval forces have permitted dependent wives and children to accompany their husbands to foreign duty stations. In addition to the more than 20,000 civilians employed by and serving with the United States armed forces overseas, there are approximately 250,000 civilian dependents living in or near military reservations outside of the continental limits of the United States. Insuring a standard of conduct on the part of such great numbers of American civilians abroad under the auspices of our military and naval forces which will be conducive to continued acceptance of their presence by the host government presents a substantial problem

for the military and naval commanders. The ruling of the District Court effectively restrains the authority of the armed forces abroad to control the activities of dependent civilians in foreign lands.

We think that the District Court failed to appreciate the essential difference between the situation presented by this case and that involved in *Toth v. Quarles*, 350 U. S. 11. Compare *Madsen v. Kinsella*, 343 U. S. 341. In the *Toth* case, the Court had before it a defendant who, at the time he was accused and held for trial by court-martial, had no connection with the military in any way. This Court held that the military could not reach out and bring him back within military jurisdiction simply because the crime had been committed when he was subject to such jurisdiction. Here, the appellee, both at the time the offense was committed and at the time she was originally held for trial by court-martial, had a direct and immediate relationship to the military, living on an American military base in a foreign country to which she had been brought by American military authorities as part of the general military program by which soldiers in our armed forces are sent overseas to fulfill our military and international commitments. She was so intimately a part of the army overseas as to be subject to military jurisdiction in terms of American military law.

Moreover, jurisdiction of appellee may be sustained on a further ground. The question in this aspect is not where to draw the line between United States military and civilian jurisdiction. The basic question is the line between American and foreign jurisdiction. Had there been no act of Congress, and no action by the executive in this matter, appellee would have been triable, not in an American civil court, but in the court of the foreign country where she happened to be. Congress has seen fit to provide that those civilians who are sent overseas, in a broad sense as part of the American military contingent, shall, because of their close connection with American military forces, be subject to trial under American law. As we show below, this decision by Congress was implemented by action in the foreign relations field. In this view, the questions are whether Congress has the power to provide that American civilians thus sent abroad as part of the program of American military commitments in foreign areas shall be triable under American law, and then whether, having that power, Congress may implement its decision through use of the existing system of courts-martial as the instrument for enforcement. The power of Congress to enact Article 2 (11) thus rests not only upon its authority under Article I, Section 8, clause 14 of the Constitution "To make Rules for the Government and Regulation of the land and naval Forces," but also upon its com-

plete power to enact legislation to aid the President in the field of international relations, both of which powers are supplemented by the "Necessary and Proper" clause.

1. Congress validly provided—under Article I, Section 8, clause 14, and the "Necessary and Proper" clause—for the trial by court-martial of persons like the appellee accompanying and living with members of the armed forces overseas. Appellee was living on an American military base in quarters furnished by the military. She was overseas because her husband, a member of the military forces, was sent abroad in fulfillment of American military commitments and because the American military authorities had determined that it furthered the morale of the armed forces to permit their families to accompany them. Cf. *Madsen v. Kinsella*, 343 U. S. 341, 345, 361. In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described in Article 2 (11), are part of the American military contingent. Their actions directly affect the discipline, the status, and the reputation of our armed forces overseas. It is therefore fitting and proper that they be subject to discipline under American military law.

The concept of subjecting to military jurisdiction civilians accompanying armies is not new. The Articles of War of King James II of England, promulgated in 1688, contemplated the trial

and punishment of civilians by courts-martial when it provided:¹

ART. XLV

No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion.

ART. XLVI

No Victualler or seller of Beer, Ale, or Wine belonging to the Army, shall Entertain any Soldier in his House, Booth, Tent, or Hutt after the Warning-Piece, Tattoo, or Beat of the Drum at night, or before the Beating of the Reveilles in the morning; Nor shall any Soldier within that time be any where but upon his Duty, or in his Quarters, upon pain of Punishment both to the Soldier and Entertainer at the Discretion of a Court-Martial.

In the British Articles of War of 1765, which served as a model for the early American Articles, there appeared Article XXIII of Section XIV, which provided:²

All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though not enlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.

¹ Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, p. 926.

² Winthrop, p. 941.

The first Articles of War of the United States, enacted by the Continental Congress on June 30, 1775, provided:

XXXII. All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not enlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.

A similar provision was contained in the 1776 Articles of War¹ which remained in effect, with irrelevant changes, until almost two decades after the adoption of the Constitution. Against this background, the constitutional provision for the government and regulation of the armed forces must be read as necessarily sanctioning the trial by court-martial of certain classes of civilians intimately related to the armed forces. Cf. *Dynes v. Hoover*, 20 How. 65, 79. It is equally significant that every successive reenactment of the Articles of War by the Congress of the United States, including the Uniform Code of Military Justice of 1950, has contained an article making civilians serving with the army subject to military law.

The word "accompanying" which now appears in Article 2 (10) and (11) of the Uniform Code of Military Justice was first introduced into military law during the general revision of the

¹ Winthrop, p. 956.

² Winthrop, p. 967 (Art. 23).

Articles of War in 1916. Major General Enoch H. Crowder, then The Judge Advocate General, who had urged this revision, after explaining to the House Committee on Military Affairs that it was intended thereby to include camp followers and persons serving with or accompanying the Army in the field, said:⁵

There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.

Following the failure of the revision in the 62d and 63d Congresses, General Crowder appeared before the Senate Committee on Military Affairs in the 64th Congress and testified:⁶

In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.) and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal gen-

⁵ Hearings before the House Committee on Military Affairs, 62d Cong., 2d Sess., on H. R. 23628, p. 61.

⁶ S. Rep. No. 130, 64th Cong., 1st Sess., pp. 37-38.

eral's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906-7 in Cuba.

Congress adopted the changes suggested by General Crowder by enacting Article 2 (d) of the Articles of War of 1916. See *Madsen v. Kinsella*, 343 U. S. 341, at 361.

The power of Congress under Article I, Section 8, to subject to court-martial jurisdiction civilians who accompany the military forces of the United States overseas has been repeatedly upheld on the theory that such civilians bear so direct a relationship to military organization and discipline as properly to be subject to military punishment. See *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y.); *Perlstein v. United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, certiorari dismissed, 328 U. S. 822; *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Rubenstein v. Wilson*, 212 F. 2d 631 (C. A. D. C.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio); *Grêwe v. France*, 75 F. Supp. 433 (E. D. Wis.). A wife brought overseas by the military as part of the general military program has, as we have shown (*supra*, pp. 6-7), the same direct relationship to military management. In the very recent opinion in *United States ex rel. Krueger v. Kinsella* (reprinted as Appendix B, *infra*, pp. 4a-16a), which involved a dependent wife who was tried by a general court-martial in Japan for the murder of her officer husband, the District Court for the Southern District of West Virginia so held, sustaining Article 2 (11) of the Uniform Code of

Military Justice. See also *Madsen v. Kinsella*, 343 U. S. 341, 345, 361, discussed *infra*, pp. 18-19.

The court-martial jurisdiction having constitutionally attached to appellee in England as a person accompanying the armed forces of the United States outside the continental limits, it was not lost by virtue of her return to the United States in Air Force custody under the court-martial sentence, or by virtue of the remand of her conviction by the Court of Military Appeals for further proceedings. *Walker v. Morris*, 3 Am. Jurist 281 (Mass.); *In re Bird*, 3 Fed. Cas. 425 (D. Ore.); *Barrett v. Hopkins*, 7 Fed. 312 (C. C. D. Kans.); *United States ex rel. Mobley v. Handy*, 156 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Perlstein v. United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, certiorari dismissed, 328 U. S. 822; *Carter v. McClaughry*, 183 U. S. 365. The decision of this Court in *Toth v. Quarles*, 350 U. S. 11, is entirely consistent with the proposition that the mere act of returning to the continental United States, after court-martial jurisdiction has attached and been exercised, does not destroy such jurisdiction.

2. The authority of Congress to enact Article 2 (11) of the Uniform Code of Military Justice may also be sustained as an exercise of the power to make all laws necessary and proper for carrying into execution the sovereign power of the United States to maintain relations with

other sovereignties.⁷ *United States v. Curtiss-Wright Corp.*, 299 U. S. 304. It is a recognized principle of international law that the jurisdiction of a nation *within its own territory* is generally absolute. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 134. As a corollary to this principle, there has developed the rule that the character of an act (relating to private parties) as lawful or unlawful is normally determined by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. Accordingly, the country in which a civilian accompanying American forces commits the crime of homicide might well insist on trying him in its own tribunals according to its own law. *American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356; *Phillips v. Eyre*, L. R. 4 Q. B. (1869) 225, 239; L. R. 6 Q. B. (1870) 1, 28; see Schwartz, *International Law and the NATO Status of Forces Agreement*, (1953) 53 Col. L. Rev. 1091, 1104-1111. The foreign nation may, however, by international agreement, express or implied, or pursuant to accepted rules of international law, consent to the exercise of jurisdiction over American nationals by duly constituted United States authorities for acts done within the territory of the foreign nation. *Duinese v. Hale*, 91 U. S. 13; *In re Ross*, 140 U. S. 453; *United*

⁷ Another pertinent source of power is that of Congress to implement the President's powers as Commander-in-Chief of our armed forces.

States v. Curtiss-Wright Corp., 299 U. S. 304, 318.

Article 2 (11) contemplates just such an arrangement for trial under American law, rather than foreign law, of Americans within the classes specified who are charged with offenses overseas. The article subjects "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and certain territories to trial by court-martial for acts done in foreign nations. That it was the purpose of Congress in enacting this provision to conform with established principles of the law of nations is evidenced by the introductory phrase that such court-martial jurisdiction will be "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law."

In the instant case, appellee, an American citizen who allegedly murdered her husband in England, was left by representatives of Her Majesty's government to the jurisdiction of the United States Air Force in England. The surrender of the right to exercise jurisdiction over appellee by the English and the exercise of such jurisdiction by the American authorities were properly accomplished pursuant to the agreement entered into by both countries and incorporated in the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. VI, Ch. 31),

Appendix C, *infra*, pp. 21a-27a. Under the terms of this international agreement, the courts-martial of the United States armed forces stationed in England were the instrumentalities by which the agreement was to be executed.

For the exercise of such extraterritorial jurisdiction over persons otherwise subject to foreign law, Congress was not required to provide a system including indictment and trial by jury; nor was it required to make the federal district courts the forum. This is clear from the decision in *In re Ross*, 140 U. S. 453, upholding against contentions like the present appellee's a conviction by a consular court for a murder by an American seaman in a Japanese port. See also, *Dorr v. United States*, 195 U. S. 138; *Ex parte Bakelite Corp.*, 279 U. S. 438. Further and more recent support derives from *Madsen v. Kinsella*, 343 U. S. 341, which closely resembles this case in its essential facts. There, as here, a dependent wife was charged with the murder of her husband, a member of the armed services with whom she was living in Germany. By executive action under the law of war, the wife was tried by a tribunal in the nature of a military commission enforcing German law. And this Court explicitly recognized that she could have been tried by court-martial under the earlier counterpart of what is now Article 2 (11). See 343 U. S. at 345, 361. While Germany was occupied territory whereas England is a friendly receiving power, the im-

portant points of similarity go far to show that in this case, as there, the power existed (in *Madsen* by conquest, here by agreement) to try by American court-martial what would otherwise be a case triable by the foreign state. Cf. *Neely v. Henkel*, 180 U. S. 109, 122.

It is clear, in other words, that the provision in Article 2 (11) for trial by court-martial of persons "accompanying the armed forces" overseas should be read in its context of international law, not merely in the purely American terms which would be involved in the case of a wife accompanying her husband *within the United States*. Thus viewed, the relevance of cases like *In re Ross*, *Neely v. Henkel*, and *Madsen v. Kinsella* becomes plain, demonstrating that in this area of foreign trials the employment of non-Article III tribunals is a valid procedure which does not deprive the American defendant of any constitutional protections to which he is entitled.

Accordingly, we do not believe that the right to use courts-martial as the means of implementing the extraterritorial jurisdiction consented to by England needs to be defended only in terms of Article I, section 8, clause 14 of the Constitution, though we believe that clause would provide a sufficient basis. The question in this aspect is whether it is reasonable for Congress to apply American law to crimes committed overseas by Americans like Mrs. Covert, by using its established system of courts-martial rather than by

setting up some other forum for trial, such as, for example, the former consular courts. Cf. *Madsen v. Kipsella*, 343 U. S. 341. Considering the many rights which safeguard a trial by court-martial (see *Burns v. Wilson*, 346 U. S. 137, 142-143), it is clear that the use of the court-martial system as the method of trying such Americans overseas is a reasonable exercise of congressional power which accords the accused a full measure of due process.

CONCLUSION

It is respectfully submitted that the decision below is erroneous, that the question presented is substantial, and that the Court should take jurisdiction of this appeal.

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FEBRUARY 1956.

APPENDIX A

United States District Court for the District
of Columbia

Habeas Corpus No. 87-55

UNITED STATES OF AMERICA ON THE RELATION OF
CLARICE B. COVERT vs. CURTIS REID, SUPERIN-
TENDENT OF THE DISTRICT OF COLUMBIA JAIL

RULING OF THE COURT

The COURT. In the present case, the petitioner while residing with her husband, a member of the United States Air Force in England, took the life of her husband and, of course, was subject to court martial under the provisions of Section 551 of Title 50 of the United States Code, the Air Force taking the position that this petitioner was a person accompanying the armed services abroad within the terms of this provision of the Code.

The case raises the very interesting question again of whether this petitioner as a civilian is entitled to the constitutional guarantees of the Fifth and Sixth Amendments or whether she was properly tried by court martial.

The Fifth Amendment, of course, exempts from its provision as to due process those cases arising in the land or naval forces. The law appeared, until a few weeks ago, to have been rather definitely settled as to what constituted a case arising within the armed or naval forces, but the

decision of the Supreme Court of the United States in the case of the United States of America ex rel. Audrey M. Toth, petitioner, vs. Donald A. Quarles, Secretary of the Air Force, decided on November 7, 1955, has virtually turned inside out a great many earlier decisions especially in Courts of Appeal and in United States District Courts.

It is true that the Toth case on several occasions refers specifically to the fact that Toth was an ex-soldier. He is described as a civilian ex-soldier. But the teaching of the case insofar as it relates to the right of the person to his constitutional guarantees in the face of court martial charges is that Toth was a civilian.

It does seem to this Court that the significant phraseology of the Toth case must be predicated upon the understanding that the Supreme Court is dealing with the rights of a civilian. The Supreme Court has decided that a civilian, even though he was in the military service at the time he committed a crime, is entitled to a trial by the civil courts. In short, the Supreme Court says—a civilian is entitled to a civilian trial.

Applying this principle to the present case, the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding.

The Court recognizes that there are great difficulties inherent in the Court's ruling today, because admittedly the military services have major and difficult problems in dealing not only with

the civilians who are members of the families of the armed forces on foreign stations.

I do believe that the problem created is one which is of ready solution by the Congress. There appears to be no difficulty in enacting statutes which would confer upon the District Courts of the United States the jurisdiction to try cases arising on these foreign stations in the same manner that crimes on the high seas are tried at the present time.

It seems that the Congress could legally declare that a civilian could be tried in the first jurisdiction in which the civilian is brought or in the jurisdiction where the civilian is found, in the same manner that the statutes now provide for this type of jurisdiction in cases involving crimes on the high seas.

I don't think the Court's observations in this regard are essential to its disposition of the present case. The Court will grant the writ in the present case.

APPENDIX B

United States District Court
For the Southern District of West Virginia
Habeas Corpus No. 1726

UNITED STATES OF AMERICA ON THE RELATION OF
WALTER KRUEGER v. NINA KINSELLA, WARDEN
OF THE FEDERAL REFORMATORY FOR WOMEN,
ALDERSON, WEST VIRGINIA

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Duncan W. Daugherty, United States Attorney;
Percy H. Brown, Assistant United States At-
torney; Lt. Colonel James W. Booth, JAGC,
Judge Advocate General's Corps, United States
Army; Lt. Colonel Cecil L. Forinash, JAGC,
Judge Advocate General's Corps, United States
Army, for Respondent.

BEN MOORE, *District Judge.*

OPINION

On January 10, 1953, Mrs. Dorothy Krueger
Smith was convicted by a United States Army
general court-martial, sitting in Tokyo, Japan,
of the premeditated murder of her husband,

Colonel Aubrey D. Smith. The killing occurred on the night of October 3 or early morning of October 4, 1952, at the quarters occupied by the couple within the area of the Washington Heights Housing Project.

Mrs. Smith was sentenced to imprisonment for life. She appealed through all available military channels, but her conviction and sentence were finally affirmed by the Court of Military Appeals on December 30, 1954. She is now held as a prisoner in the Federal Reformatory for Women, a United States Government Penal Institution located at Alderson, in the Southern Judicial District of West Virginia. Her father, Lieutenant General Walter Krueger, U. S. Army, retired, filed a petition with this Court on December 9, 1955, praying for a writ of habeas corpus on her behalf, and for her release from imprisonment on the ground that the court-martial lacked jurisdiction to try her.

I awarded the preliminary writ, and on December 20, 1955, Mrs. Smith was brought into court at Charleston by the respondent, Nina Kinsella, Warden of the institution where she is confined. The only evidence, aside from the allegations and admissions in the petition and return, were the certified record of the entire proceedings in the military courts and boards, both trial and appellate, and a copy of the petition recently filed in the United States District Court for the District of Columbia in the case of *Clarice B. Covert vs. Curtis Reid, Superintendent of the District of Columbia jail*. Counsel were given unlimited time to present their arguments, as well as time

to file further briefs in addition to those submitted prior to the hearing.

It is pertinent to observe here that Brigadier General Onslow S. Rolfe, Commander of Headquarters and Service Command, Far East Command, detailed several officers from other commands to serve on the court-martial, among whom was Major General Joseph P. Sullivan. General Sullivan's service was with the concurrence of his commanding officer, Lieutenant General Mark Clark, Commander in Chief, Far East Command. All the other officers who were to sit on the court-martial were subordinate in rank to General Rolfe.

Mrs. Smith, who was represented at the trial and in all stages of her appeal by Brigadier General Adam Richmond, a retired officer of long legal and military experience, made no objection to the composition of the court-martial before any military court. The challenge is brought forth at this hearing for the first time.

In attacking the jurisdiction of the court-martial, petitioner advances two arguments:

1. That the court was illegally constituted, in that one of the officers who composed it was a Major General, whereas the convening officer was a Brigadier General;

2. That Mrs. Smith, being a civilian, was not subject to the Code of Military Justice, under the circumstances which prevailed at the time of the alleged offense and at the time of her trial.

The requirements for eligibility to sit as a member of a general court-martial are set out in Article 25 of the Uniform Code of Military Justice (50 U. S. C. 589) as follows:

Any officer on active duty with the armed forces shall be eligible to serve on all courts-martial for the trial of any person who may lawfully be brought before such courts for trial.

There is thus no doubt that Major General Sullivan was eligible in the ordinary sense of the word, to serve as a member of a general court-martial. It is argued by counsel for petitioner that "eligibility" necessarily includes inferiority in rank to the convening officer; and that, since Brigadier General Rolfe, being subordinate in rank to Major General Sullivan, had no authority to order the latter to do anything, he could not therefore make him a member of a general court-martial.

At most, this argument turns on a mere technicality. It is not even pretended that Mrs. Smith suffered any disadvantage, or that her rights were in any way affected by the presence of Major General Sullivan as a member of the court-martial. Actually, General Sullivan was acting under the orders of his superior officer, General Mark Clark. The Manual for Courts-Martial provides for situations of this kind by the following language (see Manual for Courts-Martial, subparagraph 4f).

Appointment of members and law officers from other commands of the same armed force.—The convening authority may, with the concurrence of their proper commander, appoint as members of a court-martial * * * eligible persons of the same armed force who are not otherwise under his command. Concurrence of the proper

commander may be oral and need not be evidenced by the record of trial.

General Rolfe's convening of the court was an administrative, as distinguished from an operational command. In civil affairs, it would be regarded merely as an appointment, and it is so referred to in the above excerpt from the Manual for Courts-Martial. I can find nothing in the Code of Military Justice to indicate that in performing such a function distinctions of rank are important. Possibly General Sullivan might have had grounds based on seniority of rank for declining to sit on the court; possibly Mrs. Smith might have objected at the time to his sitting; but he having willingly acceded to the convening order, and she not having objected at any time to his sitting as a member of the court-martial, I hold that the objection to General Sullivan as a member of the court-martial, if there was a substantial objection, has been waived, and cannot now be raised. The applicable rule of decision is found in the case of *Swaim v. United States*, 165 U. S. 553, rather than in *McClaghry v. Deming*, 186 U. S. 49, relied on by petitioner.

Having concluded that the technical or procedural objection to the jurisdiction of the court-martial is without merit, I am forced to consider the constitutional question raised by the petitioner.

Counsel for petitioner very frankly says that the present effort to procure Mrs. Smith's release on this writ of habeas corpus stems from the recent decision of the United States Supreme Court in the case of *United States of America*,

ex rel., *Andrey M. Toth, vs. Donald A. Quarles, Secretary of the United States Air Force*, 76 Sup. Ct. 1 (1955), followed by the action of the District Court of the District of Columbia in freeing Mrs. Clarice Covert in circumstances very similar to those which surround Mrs. Smith. The *Covert* case has not yet been reported.

I think the *Toth* case is readily distinguishable. Toth was a civilian residing in the continental United States, who, at the time charges were made against him, had no connection with the armed forces. The decision in that case turned on the right of Toth to claim the protection of those Constitutional guaranties which secure to persons accused of crime in this country, except those who are in the land or naval forces, the traditional safeguards which accompany every criminal trial in the civil courts. Chief among these are the right to have the charge, if a felony, presented to a grand jury, the right to trial by jury, and to have these rights passed on by courts whose judges are a part of our Constitutional system of civil courts. Not all of these safeguards are or can be provided in a trial by court-martial.

In the *Covert* case the status of the petitioner was that of a person who, having been charged and convicted by a United States Army court-martial in a foreign land, was now within the borders of the United States, her conviction reversed, and she, no longer a follower of the army, merely awaiting trial on the original charge. Judge Tamm thought that under those circumstances the principle announced in the *Toth* case obliged him to grant her freedom pursuant to the

writ of habeas corpus. I do not think it necessary, because of the different circumstances in the case before me, either to adopt or reject his reasoning.

Mrs. Smith's situation differed from that of Toth in at least two significant respects:

(1) She was not living in the United States, nor present there when she was charged with the murder of her husband;

(2) She was connected with the army as a person "accompanying the armed forces without the continental limits of the United States;" both when she committed the act and when she was arrested and tried for it.

It may be useful at this point to examine the sections of Article 2 of the Code of Military Justice, "Title 50, U. S. C. A., § 552," which specify the conditions under which persons accompanying the armed forces may be tried by court-martial.

The pertinent sections of Article 2 read as follows:

The following persons are subject to this (chapter):

* * *

(10) In time of war, all persons serving with or accompanying an armed force in the field;

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party, or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States.

* * *

It is to be observed that Article 2 (10) gives unlimited court-martial jurisdiction over followers of the army in time of war and in the field. While it is not argued by counsel for petitioner that Article 2 (10) in any way exceeds the Constitutional power of Congress, it is proper, I think, to point out the distinctions drawn by Congress itself between Article 2 (10) and Article 2 (11).

The reason for such a broad grant of court-martial jurisdiction in time of war is obvious. It is essential that the operations of an army in the field be unobstructed by the acts of any person, whatever his status. Even if the Constitution were silent on the subject, military commanders in the field of war would nevertheless have the usual and necessary court-martial powers by virtue of the law of war itself. Congress having been granted in the Constitution the powers to "declare war" and to "raise and support armies," as well as to "make rules for the government and regulation of the land and naval forces," the last mentioned power, insofar as it is to operate in time of war; is referable to the others, and is co-extensive in scope with the law of war under which court-martial jurisdiction is permitted over certain classes of civilians. *Madsen v. Kinsella*, 343 U. S. 341 (1952).

Article 2 (11) is not limited to a time of war or to the field of action. It purports to extend the coverage of the Code of Military Justice (and hence the jurisdiction of courts-martial) to all persons "accompanying the armed forces" abroad. This coverage, however, is conditional. If some accepted rule of international law or the

terms of some treaty or agreement to which the United States is a party are applicable to a particular case, then by its own limitations Article 2 (11) does not come into play.

Now, it is a well recognized maxim of the law of nations that a citizen of one country who commits a local crime in another country is amenable to the laws of the latter. In the absence of a treaty he is entitled to claim no extra-territorial rights. If he believes himself to have been unfairly dealt with, his only recourse is through diplomatic channels. From this maxim flows the principle, recognized by the Supreme Court in the case of *In re Ross*, 140 U. S. 453 (1891), and never repudiated in any case that I have found, that the United States Constitution gives no protection to persons accused of committing local crimes in foreign countries.

Counsel for petitioner, in his brief and in argument, has cited several cases from which he argues that the doctrine that the Constitution does not "follow the flag" is outmoded, and is not now the law. *United States v. Flores*, 289 U. S. 137 (1933); *Blackmer v. United States*, 284 U. S. 421 (1932); *United States v. Bowman*, 260 U. S. 94 (1922); *Jones v. United States*, 137 U. S. 202 (1890); *Best v. United States*, 184 F. 2d 131 (1st Cir. 1950). On examination of those cases it is found that in every instance the crime involved was one denounced by some statute of the United States, and triable in some one of our District Courts. In no instance has it been even contended that a person accused of a purely local crime in a foreign country may claim any of the procedural

rights guaranteed in the Constitution of the United States.

It is plain, therefore, that the rule of *Tott v. Quarles* does not apply here. Still, as I have indicated, it is not enough to find that the provisions of our Bill of Rights and other prohibitory sections of our Constitution did not stand between Mrs. Smith and her trial by court-martial. If the jurisdiction is to be sustained, we must go farther, and discover in that instrument an affirmative grant of Congressional power, either expressly or by necessary implication.

It is in evidence that in the year 1952 the newly reorganized Government of Japan entered into a treaty with the United States, which was duly ratified by the Senate. By an administrative agreement implementing that treaty, the Japanese Government ceded to the United States, through its military courts and authorities, all jurisdiction to try offenses committed in Japan by dependents of members of the armed forces, excluding those of Japanese nationality. Had this treaty been in effect at the time Article 2 (11) of the Code of Military Justice was enacted, it might be cited as the source of Congressional power to pass this act; but it would scarcely be contended, I think, that a piece of legislation, if it were void for lack of constitutional authority when passed, could be validated by a later treaty, even though Congress might subsequently act freely in that field. However, the treaty did remove the limitations which in its absence would have prevented Article 2 (11) from taking effect, in that upon the ratification of the treaty there was no longer any "accepted rule of international

law" or any treaty to the contrary which interfered with its operation.

I am driven to the conclusion that constitutional authority for subjecting civilians accompanying the armed forces to court-martial discipline in time of peace, if such exists, must be found in Article 1, Section 8 of the Constitution, by one of the clauses of which section the power is bestowed on Congress "to make rules for the government and regulation of the land and naval forces," as supplemented by the "necessary and proper" clause.

Courts are slow to reject as unconstitutional a law which has been duly passed by Congress. Congressmen as well as Judges take an oath to support the Constitution of the United States. It is not probable that in any session of that body there should be a dearth of members who are themselves expert in the field of Constitutional law. It is not to be lightly supposed, therefore, that Congress would enact such an important bit of legislation as that which we have under consideration without a careful inquiry into the scope of its own Constitutional power. True it is that if a law of Congress clearly transgresses some positive prohibition expressed in the Constitution it is the duty of a court to strike it down; but where, as here, the problem is merely to find authority for an act which is not forbidden by that instrument, we must proceed more cautiously. In view of the "necessary and proper" clause, we must weigh in the scales in favor of the law's validity every circumstance which may be reasonably assumed to have influenced its enactment. As was said by Chief Justice Marshall in the cele-

brated case of *McCulloch v. Maryland*, 4 Wheat. 316 (U. S. 1819):

We admit, as all must admit, that the powers of the government are limited, and that its limits are not to be transcended. But we think the sound construction of the constitution must allow to the national legislature that discretion, with respect to the means by which the powers it confers are to be carried into execution, which will enable that body to perform the high duties assigned to it, in the manner most beneficial to the people. Let the end be legitimate, let it be within the scope of the constitution, and all means which are appropriate, which are plainly adapted to that end, which are not prohibited, but consist with the letter and spirit of the constitution, are constitutional * * * where the law is not prohibited, and is really calculated to effect any of the objects intrusted to the government, to undertake here to inquire into the degree of its necessity, would be to pass the line which circumscribes the judicial department, and to tread on legislative ground.

Since the end of World War II segments of the Armed Forces of the United States have been stationed in many nations throughout the world. In the interest of keeping the morale of the troops on a high level, the Government has encouraged the wives of soldiers to accompany them and live with them at their various posts, and has expended vast sums of money in transportation and maintenance charges for that purpose. It was said in argument and not disputed that there are now no fewer than a quarter of a million civilians of all descriptions accompanying

the Armed Forces without the continental limits of the United States and the territories mentioned in Article 2 (11) of the Code of Military Justice. In the existing circumstances, if these civilians are to be exempt from discipline by the military forces in the only available way, namely, by court-martial procedure, a most serious situation is presented. They must then either be subject in all respects to the local laws of the countries where they are stationed, or else they are left free from all restraints whatsoever.

Though I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is "part" of the Armed Forces, nevertheless I cannot say with certainty that the power of Congress to provide for court-martial discipline of those civilians accompanying the Armed Forces abroad is not necessarily and properly incident to the express power "to make rules for the government and regulation of the land and naval forces." Neither the *Toth* case nor any other expression by the Supreme Court compels such a conclusion. Therefore, I must uphold Article 2 (11) of the Code of Military Justice in its entirety.

The writ of habeas corpus will be discharged.

APPENDIX C

UNITED STATES OF AMERICA (VISITING FORCES) ACT, 1942

(5 & 6 Geo. 6)

CHAPTER 31

An Act to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America, relating to jurisdiction over members of the military and naval forces of the United States of America. [6th August 1942.]

Whereas His Majesty, in exercise of the powers conferred on Him by subsection (3) of section one of the Allied Forces Act, 1940, and of all other powers enabling Him in that behalf, has been pleased, by Order in Council, to make provision defining the relationship of the authorities, and courts of the United Kingdom to the military and naval forces of the United States of America who are or may hereafter be present in the United Kingdom or on board any of His Majesty's ships, or aircraft, and facilitating the exercise in the United Kingdom or on board any ship or aircraft of the jurisdiction conferred on the service courts and authorities of the United States of America by the law of that country: And whereas the Notes relating to jurisdiction over members of the said forces set out in the

Schedule to this Act have been exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America:

And whereas it is expedient to give effect to the agreement recorded by the said Notes:

Now, therefore, be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America:

Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.

(2) The foregoing subsection shall not affect any powers of arrest, search, entry, or custody, exercisable under British law with respect to offences committed or believed to have been committed against that law, but where a person against whom proceedings cannot, by virtue of that subsection, be prosecuted before a court of the United Kingdom is in the custody of any authority of the United Kingdom, he shall, in accordance with such general or special directions as may be given by or under the authority of a Secretary of State, the Admiralty, or the Minister for Home Affairs in Northern Ireland, for the

purpose of giving effect to any arrangements made by His Majesty's Government in the United Kingdom with the Government of the United States of America, be delivered into the custody of such authority of the United States of America as may be provided by the directions, being an authority appearing to the Secretary of State, the Admiralty, or the Minister, as the case may be, to be appropriate having regard to the provisions of any Order in Council for the time being in force under the Act hereinbefore recited and of any orders made thereunder.

(3) Nothing in this Act shall render any person subject to any liability whether civil or criminal in respect of anything done by him to any member of the said forces in good faith and without knowledge that he was a member of those forces.

2.—(1) For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces:

Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom.

(2) For the purposes of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may

be appointed for the purpose by the Government of the United States of America stating that a person of the name and description specified in the certificate is, or was at a time so specified, subject to the military or naval law of the United States of America, shall be conclusive evidence of that fact.

(3) For the purposes of any proceedings in any court of the United Kingdom in which the question is raised whether a party to the proceedings is, or was at any time, a member of the military or naval forces of the United States of America, any such certificate as aforesaid relating to a person bearing the name in which that party is charged or appears in the proceedings shall, unless the contrary is proved, be deemed to relate to that party.

(4) Any document purporting to be a certificate issued for the purposes of this section, and to be signed by or on behalf of an authority described as appointed by the Government of the United States of America for the purposes of this section, shall be received in evidence, and shall, unless the contrary is proved, be deemed to be a certificate issued by or on behalf of an authority so appointed.

3.—(1) His Majesty may by Order in Council direct that the foregoing provisions of this Act shall, subject to such adaptations and modifications as may be specified in the Order, have effect in any colony or in any British protectorate or in any territory in respect of which a mandate on behalf of the League of Nations is being exercised by His Majesty's Government in the United King-

dom, in like manner as they have effect in the United Kingdom.

(2) An Order in Council under this section may be revoked or varied by a subsequent Order in Council.

4. This Act may be cited as the United States of America (Visiting Forces) Act, 1942.

UNITED STATES OF AMERICA
(VISITING FORCES) ACT, 1942

(5 & 6 Geo. 6)

SCHEDULE

NOTES EXCHANGED BETWEEN HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA

No. W. 10338 13/64

FOREIGN OFFICE, S. W. 1.
27th July, 1942.

YOUR EXCELLENCY, Following the discussions which have taken place between representatives of our two Governments, His Majesty's Government in the United Kingdom are prepared, subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces, and they are ready to introduce in

Parliament the necessary legislation for this purpose.

2. It is appreciated, however, that cases may arise where for particular reasons the American authorities may prefer that their courts should not exercise the above jurisdiction, and His Majesty's Government would accordingly propose that in any case in which a written communication to that effect is received from the Diplomatic Representative of the United States it should be open to the appropriate British authority to restore the jurisdiction of the courts of the United Kingdom to deal with that case.

3. In view of the very considerable departure which the above arrangements will involve from the traditional system and practice of the United Kingdom there are certain points upon which His Majesty's Government consider it indispensable first to reach an understanding with the United States Government. I have accordingly the honour to invite Your Excellency to be so good as to lay the following enquiries and observations before your Government and to inform me of their attitude thereupon.

4. In the first place, the readiness of His Majesty's Government in the United Kingdom to agree to the exercise by United States Service courts of exclusive jurisdiction in respect of offences by members of their Forces is based upon the assumption that the United States Service authorities and courts concerned will be able and willing to try and, on conviction, to punish all criminal offences which members of the United States Forces may be alleged on sufficient evidence to have committed in the United Kingdom,

and that the United States authorities are agreeable in principle to investigate and deal with appropriately any alleged criminal offences committed by members of the United States Forces in the United Kingdom which may be brought to their notice by the competent British authorities, or which the American authorities may find to have taken place.

5. Secondly, His Majesty's Government will be glad if Your Excellency will confirm their understanding that the trial of any member of the United States Forces for an offence against a member of the civilian population would be in open Court (except where security considerations forbade this) and would be arranged to take place promptly in the United Kingdom and within a reasonable distance from the spot where the offence was alleged to have been committed, so that witnesses should not be required to travel great distances to attend the hearing.

6. Thirdly, His Majesty's Government propose that no member of the United States Forces should be tried in the United Kingdom by a Service Court of the United States of America, for an offence committed by him before 7th December, 1941.

7. Fourthly, while His Majesty's Government in the United Kingdom would not wish to make the arrangements in regard to jurisdiction over members of the United States Forces in this country dependent upon a formal grant of reciprocity in respect of United Kingdom Forces in the territory of the United States of America, I feel that Your Excellency will appreciate that the considerations which have convinced His Majesty's

Government in the United Kingdom that the interests of our common cause would be best served by the arrangements which they are prepared to make as regards jurisdiction over American forces in the United Kingdom would be equally applicable in the case of British forces which in the course of the war against our common enemies may be stationed in territory under American jurisdiction. It would accordingly be very agreeable to His Majesty's Government in the United Kingdom if Your Excellency were authorised to inform me that in that case the Government of the United States of America will be ready to take all steps in their power to ensure to the British forces concerned a position corresponding to that of American forces in the United Kingdom under the arrangements which His Majesty's Government are willing to make. The considerations indicated in paragraph 2 above would naturally apply and His Majesty's Government would be prepared to authorise the Diplomatic Representative of His Majesty in the United States to notify the competent American authorities in cases where the appropriate British authorities preferred not to exercise jurisdiction.

8. Fifthly, the proposal to ensure to the United States Service courts and authorities by legislation the exclusive exercise of jurisdiction in respect of criminal offences by members of the United States Forces in the United Kingdom is based upon the further assumption that satisfactory machinery will be devised between the competent American and British authorities for such mutual assistance as may be required in making investigations and collecting evidence in

respect of offences which members of the United States Forces are alleged to have committed, or in which they are alleged to be concerned. His Majesty's Government have no doubt that the United States Government will agree that it would as a general rule be desirable that such preliminary action should be taken by the British authorities, on behalf of the American authorities, where the witnesses or other persons from whom it is desired to take statements are not members of the United States Forces. Conversely, His Majesty's Government trust that they may count upon the assistance of the American authorities in connexion with the prosecution before British courts of persons who are not members of the United States Forces where the evidence of any member of these Forces is required or where the assistance of the American authorities in the investigation of the case (including the taking of statements from the American forces) may be needed.

9. His Majesty's Government in the United Kingdom are prepared to extend the proposed legislation where necessary to British Colonies and Dependencies under their authority, other than those British territories in which are situated the United States Military and Naval Bases leased in pursuance of the Agreement of 27th March, 1941, where the question of jurisdiction is already regulated by that Agreement. I accordingly propose that the foregoing paragraphs of this note, and your eventual reply, should be regarded as extending also to the arrangements to be made in the British Colonies and Depend-

encies to which the proposed legislation may be applied.

10. Finally, His Majesty's Government propose that the foregoing arrangements should operate during the conduct of the conflict against our common enemies and (until six months (or such other period as may be mutually agreed upon) after the final termination of such conflict and the restoration of a state of peace.

11. If the foregoing arrangements are acceptable to the United States Government, I have the honour to propose that the present note and Your Excellency's reply be regarded as constituting an agreement between the two Governments to which effect shall be given as from the date on which the legislation to which I have already referred takes effect.

I have the honour to be,

With the highest consideration,

Your Excellency's obedient servant,

ANTHONY EDEN.

His Excellency

The Honourable

JOHN G. WINANT.

EMBASSY OF THE
UNITED STATES OF AMERICA.

London, 27th July, 1942.

No. 1919

SIR, I have the honor to refer to your note of July 27, 1942, in which you inform me that His Majesty's Government in the United Kingdom is prepared, subject to the necessary Parliamentary authority, to give effect to the design of the

Government of the United States that American authorities have exclusive jurisdiction in respect to criminal offences which may be committed in the United Kingdom by members of the American Forces. I now have the honor to inform you that my Government agrees to the several understandings which were raised in your note.

In order to avoid all doubt, I wish to point out that the Military and Naval authorities will assume the responsibility to try and on conviction to punish all offences which members of the American Forces may be alleged on sufficient evidence to have committed in the United Kingdom.

It is my understanding that the present exchange of notes is regarded as constituting an agreement between the two Governments to which effect shall be given as from the date on which the necessary Parliamentary authority takes effect.

Accept, Sir, the renewed assurance of my highest consideration.

JOHN G. WINANT.

The Right Honourable

ANTHONY EDEN, M. C., M. P.

Office - Supreme Court, U. S.
No. 11, 11, 13

FEB 23 1956

WILLIAM S. WILEY, Clerk

No. 701

In the Supreme Court of the United States

October Term, 1955

**CURTIS REED, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, APPELLANT**

CLARENCE B. COVERT

**ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA**

**WRIT IN OPPOSITION TO APPELLANT'S MOTION TO
REVOKE OR REVOKE**

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT OF COLUMBIA

BRIEF IN OPPOSITION TO APPELLEE'S MOTION TO
DISMISS OR AFFIRM

1. Appellee contends that this Court is without jurisdiction to hear this appeal under 28 U.S.C. 1252, which provides:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States

or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.¹

Appellee concedes that the District Court has held unconstitutional in a civil action¹ an act of the Congress. Her motion to dismiss is based solely on the ground that appellant, Superintendent of the District of Columbia Jail, is not an employee of the United States within the purview of the statute since he is an employee of the District of Columbia. Appellant is, however, clearly an employee of an agency of the United States, and in the context of this case, is also an agent of the United States directly. The direct appeal is therefore authorized by 28 U.S.C. 1252.

a. The District of Columbia, although a distinct municipal corporation,² is an agency of the United States. 28 U.S.C. 1252 speaks of a suit or proceeding "to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party."³ Considering the punctuation and the manifest purpose of the statute to afford the United States Govern-

¹ A proceeding for a writ of habeas corpus has always been held by this Court to be civil in nature. *Ex parte Tom Tona*, 108 U.S. 556; *Kurtz v. Moffitt*, 115 U.S. 487; *Farnsworth v. Montana*, 129 U.S. 104, 113; *Cross v. Burke*, 146 U.S. 82, 88; *Ex parte Milligan*, 4 Wall. 2, 113.

² *Beynes v. District of Columbia*, 91 U.S. 540; *Metropolitan R. Co. v. District of Columbia*, 132 U.S. 4; *District of Columbia v. Woodbury*, 135 U.S. 450; *District of Columbia v. John R. Thompson Co., Inc.*, 346 U.S. 100.

ment as a whole an opportunity for prompt review of constitutional issues, the phrase "employee thereof" as used in the statute must refer to an employee of an agency of the United States, as well as to an employee of the United States as such. And there can be no doubt that appellant is an employee of an agency of the United States.

In describing the relationship of the District of Columbia Government to the Government of the United States, this Court has consistently adverted to the agency concept implicit in every municipal corporation.⁹ In the *Metropolitan R. Co.* case, *supra*, p. 8, it said:

All municipal governments are but *agencies* of the superior power of the State or govern-

⁹ In construing the predecessor statute of August 24, 1937, c. 754, 50 Stat. 752, 28 U.S.C. (1940 ed.) 349a, this Court said, in *Fleming v. Rhodes*, 331 U.S. 100, 104, "The Congress intended prompt review of the constitutionality of federal acts." The Court quoted from H. Rep. No. 212 (75th Cong., 1st Sess.) p. 2, the following:

The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of Congress requires no comment.

And from S. Rep. No. 963 (75th Cong., 1st Sess.) pp. 3-4:

The United States is not excluded by the principle thus stated, from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights.

ment by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those *agencies* and the mode of appointing officials to execute them are matters of legislative discretion. [Emphasis added.]

In *District of Columbia v. Woodbury*, *supra*, p. 452, the Court, discussing the Board of Public Works of the District of Columbia, referred to the agency aspect of municipal corporations when it wrote:

* * * Although that Board was dependent upon both Congress and the Legislative Assembly of the District, and was the *hand and agent* both of the United States and of the District, it was held to be the representative and a part of the municipal corporation created by the act of 1871. [Emphasis added.]

And the recent discussion in *District of Columbia v. Thompson Co.*, *supra*, p. 109, makes it clear that the agency concept implicit in municipal corporations is applicable to the Government of the District of Columbia acting in behalf of the Government of the United States. Similarly, the Court in *Penn Bridge Co. v. United States*, 29 App. D. C. 452, 457 (1907), said:

* * * The government of the District of Columbia is simply an agency of the United

States for conducting the affairs of its government in the Federal District.

Congress, in exercise of its constitutional power under Article I, section 8, clause 17, over the seat of government of the United States, included the District of Columbia within the definition of "agency" in the Legislative Reorganization Act of 1949 (63 Stat. 203, 205).⁴ Pursuant to the authority granted him under this Act, the President promulgated Reorganization Plan No. 5 of 1952, providing for the reorganization of the Government of the District of Columbia.⁵ Under this plan the functions of the Board of Public Welfare, which had "complete and exclusive control and management" of the Washington Asylum and Jail,⁶ together with the functions of the officers thereof, were transferred to the Board of Commissioners of the District of Columbia. Of the three Commissioners comprising the Board, two are appointed by the President with the advice and consent of the Senate⁷ and one, the Engineer Commissioner, is appointed by the President from the ranks of the Corps of Engineers of the United States Army.⁸ The Commissioners, authorized to delegate the functions assigned to them by the Reorganization Plan, issued District of Columbia

⁴ 5 U.S.C. 133z to 133z-15.

⁵ 3 C.F.R. 1952 Supp. p. 124.

⁶ D.C. Code, 1951 ed. 3-406, 24-409.

⁷ D.C. Code, 1951 ed. 1-201.

⁸ D.C. Code, 1951 ed. 1-202, 203.

Reorganization Order No. 34, effective June 21, 1953, whereby a Department of Corrections under a Director was created and charged with responsibility for the maintenance of the District of Columbia Jail." Appellant, as superintendent of the jail, is responsible to the Director of the Department of Corrections and, through him, to the Commissioners. Inasmuch as the Commissioners are officers of the United States by virtue of Article II, section 2 of the Constitution, and the Department of Corrections, like the Board of Public Works in *District of Columbia v. Woodbury*, *supra*, is an agency of the United States, this proceeding against appellant, their employee, is within 28 U.S.C. 1252.

b. Appellant is also an agent of the United States directly. The functions of appellant as superintendent of the District of Columbia Jail mark him generally as an agent of the United States rather than of the District of Columbia alone.

Section 425 of Title 24 of the District of Columbia Code provides:

All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and Acts of Congress in the nature of municipal regulations and ordinances, shall be committed, for their terms of imprisonment, and to such types of institutions as the court

* See Reorganization Order No. 34, Appendix to Title I of Supp. III of D. C. Code, 1951 ed., p. 34.

may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia Government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner or relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons. [July 15, 1932, ch. 492, § 11, as added June 6, 1940, 54 Stat. 244, ch. 254, § 8.]

Inasmuch as "[c]rimes committed in the District are not crimes against the District, but against the United States" (*Metropolitan R. Co. v. District of Columbia*, 132 U.S. 1, 9), the foregoing section of the Code makes manifest that appellant derives his authority to detain prisoners from the Attorney General of the United States. Acting under instructions of the Attorney General in regard to the detention of prisoners, he is properly characterized an agent of the United States.¹⁹

¹⁹ The duties imposed on appellant under D. C. Reorganization Order No. 34, *supra*, fn. 9, are principally concerned with

c. In the context of this case appellant is also an agent of the United States Air Force. Although appellant is authorized generally under 48 U.S.C. 4083 to accept prisoners convicted by courts-martial, in accepting custody of appellee he acted upon request of officers of the United States Air Force and made the facilities of the District of Columbia Jail available for her detention. The Air Force officers, in making their request of appellant, acted under authority of Article 10, Uniform Code of Military Justice (50 U.S.C. 564), to obtain suitable quarters for confinement since no facilities for restraint of women were available on Air Force Bases in and around Washington. Hence, in detaining appellee, appellant, who normally derives authority to restrain prisoners from the Attorney General, acted as an agent for the Air Force.

Thus it is clear that appellant, as ~~superintendent~~ of the District of Columbia Jail, was, while custodian of appellee, an agent or employee of the United States within the ambit of 28 U.S.C. 1252 as interpreted in *Fleming v. Rhodes*, *supra*. This is so whether he is deemed an employee of the Commissioners of the District of Columbia, who are constitutional officers of the United States, or an agent of the Attorney General under whose authority he detains all prisoners committed to his custody, or an agent of the United States Air

the maintenance and care of the physical properties of the jail. Compare section 420 with section 421, both of Title 24, D. C. Code, 1951 ed.

Force officers who are authorized to invoke civilian custodial facilities if the occasion requires.

2. In her motion to affirm the judgment below, appellee contends that the decision in *Toth v. Quarles*, 350 U.S. 11, established that Congress does not have the constitutional power to subject any civilians to court-martial jurisdiction in time of peace, and, therefore, that a dependent wife who accompanies her husband to a foreign duty station under the auspices of the armed forces may not be tried by a court-martial for crimes committed in the foreign country.

This argument, however, glosses over the essential factual differences between this and the *Toth* case. Whereas in the *Toth* case, Toth had been honorably discharged from the Air Force and had resumed his normal role and occupation as a civilian at the time he was charged and arrested for the alleged murder, appellee, at the time she was charged and arrested, was still in England residing on an Air Force base under auspices of the United States Air Force. She had not at the time of her trial reverted to her status as a civilian within the jurisdiction of the United States courts. Moreover, the appellee misconceives (Motion, pp. 15-17) our argument regarding the fact that the alleged murder occurred in England under circumstances which would ordinarily make the crime triable there. Our point is not, of course, that an Act of the English Government could create for Congress powers it otherwise lacks. Rather, it is that for the exercise of

such ceded extra-territorial jurisdiction. Congress has power, as this Court's decisions show, to provide for trial by tribunals other than Article III courts without prescribing indictment and trial before a petit jury. *In re Ross*, 140 U. S. 453; *Neely v. Henkel*, 180 U. S. 109.

As noted in the Statement as to Jurisdiction, the issue presented affects the power of the United States to control the 250,000 American citizens residing in foreign nations as dependents of personnel in the United States armed forces stationed abroad. The issue is plainly an important one which should be fully developed before this Court.

CONCLUSION

It is respectfully submitted that for the foregoing reasons the motion ~~to dismiss~~ this appeal for want of jurisdiction, or, in the alternative, to affirm for lack of a substantial question, should be denied.

SIMON E. SOBELOFF,

Solicitor General.

WARREN OLNEY III,

Assistant Attorney-General.

BEATRICE ROSENBERG,

RICHARD J. BLANCHARD,

Attorneys.

MARCH 1956.

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HAROLD B. WILLEY, Clerk

No. 701

In the Supreme Court of the United States

OCTOBER TERM, 1955

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, APPELLANT

v.

CLARICE B. COVERT

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

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2. For the exercise of extraterritorial jurisdiction like that governed by Article 2 (11), Congress was not required to provide for indictment and jury trial in Article III courts, but could authorize trial by court-martial with the guaranties of due process such trial affords

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III. Jurisdiction over appellee under Article 2 (11) was not lost by reason of her transportation to the United States, her imprisonment in the Federal Reformatory for Women, or the reversal of her conviction by the Court of Military Appeals

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

**CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, APPELLANT**

v.

CLARICE B. COVERT

**ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA**

BRIEF FOR APPELLANT

OPINION BELOW

The opinion of the District Court granting the writ of habeas corpus (R. 131-134) is not reported.

JURISDICTION

On November 22, 1955, the District Court entered an order granting appellee a writ of habeas corpus and ordering her discharge from the custody of appellant (R. 134). A notice of appeal to this Court was filed in the District Court on December 22, 1955 (R. 135-136). The jurisdiction of this Court to review on direct appeal the

decision of the District Court, granting the writ of habeas corpus on the ground that the Act of Congress under which the appellee was being held for rehearing by court-martial is unconstitutional, is conferred, we believe, by 28 U. S. C. 1252. On March 12, 1956, this Court postponed further consideration of the question of jurisdiction to the hearing of the case on the merits, and transferred the case to the summary calendar (R. 145). The jurisdictional issue is discussed in Point I of our Argument, pp. 6-8, 13-27, *infra*.

QUESTIONS PRESENTED

1. Whether the Superintendent of the District of Columbia Jail, who holds appellee for the United States Air Force, is "an officer or employee" of the United States or of an agency thereof within the purview of 28 U. S. C. 1252, so that this Court has jurisdiction of this appeal.

2. Whether Congress has power under the Constitution to confer jurisdiction on a court-martial to try a dependent wife of a member of the United States Air Force, residing in public quarters on the air base in England at which her husband was stationed, for the crime of murdering her husband within the confines of the air base in England.

STATUTES INVOLVED

28 U. S. C. 1252, provides in pertinent part:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the

United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

50 U. S. C. 552, 64 Stat. 109, Article 2 of the Uniform Code of Military Justice, provides in pertinent part:

SEC. 552. PERSONS SUBJECT TO THIS CHAPTER (ARTICLE 2).

The following persons are subject to this chapter:

* * * * *

(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands * * *.

STATEMENT

The appellee was tried by court-martial at a United States Air Force base in England for the murder of her husband, an Air Force sergeant, on or about March 10, 1953, at a United States

Air Force base in England (R. 1; 5): She was convicted and sentenced to imprisonment for life (R. 2, 5). Her conviction was affirmed by the Board of Review (R. 12-61). On review by the Court of Military Appeals of issues with respect to the evidence and instructions regarding insanity, the conviction was set aside and a rehearing directed, if practicable (R. 97-110).

In affirming the conviction, the Board of Review found that appellee was a person accompanying the armed forces without the continental limits of the United States and within the ambit of Article 2 (11) of the Uniform Code of Military Justice, *supra* (R. 30-32). Evidence introduced at the trial established that appellee and her children had been brought to England via military surface transport at government expense on application by her husband pursuant to permission granted by the Commanding General, Third Air Force (R. 31). She and her husband had been assigned to public quarters on the base (R. 31). She was authorized to use the facilities of the commissary and post exchange, and was entitled to receive, and did receive, medical treatment at the United States Air Force facilities at the base (R. 31).

The Board of Review also noted that at the time of the commission of the alleged offense there was in existence the United States of America (Visiting Forces) Act, 1942 (5 and 6 Geo. VI, Ch. 31) (Appendix, *infra*, pp. 74-84), effectuating

an agreement between the Government of the United States of America and the Government of the United Kingdom, which related to jurisdiction over members of the military and naval forces of the United States. In accordance with the provisions of that Act, the United States Base Commander executed an appropriate certificate which was delivered to an authorized representative of the British Government, setting forth that the accused was on March 10, 1953, a person subject to the military laws of the United States, and thereafter no action was taken in respect to the accused by British authorities (R. 32).

Following her conviction by the general court-martial in England, appellee was confined in the Federal Reformatory for Women, Alderson, West Virginia (R. 2). After the conviction was set aside by the Court of Military Appeals, a rehearing was ordered to be had by a court-martial convened at the Bolling Air Force Base, and appellee was transferred to Washington, D. C. (R. 8, 122). There being no suitable custodial facilities for women at any military installation in the Washington area, she was confined in the District of Columbia Jail on July 14, 1955 (R. 123).

On July 15, 1955, the civilian counsel of appellee asked the appropriate military authority to arrange for an examination of appellee as to her present mental condition and to transfer her to a suitable medical facility for this purpose (R.

124). The Superintendent of St. Elizabeth's Hospital, Washington, D. C., at the request of the military, accepted the appellee for examination (R. 124-128). Following the examination at St. Elizabeth's Hospital, appellee was returned to the District of Columbia Jail.

On November 17, 1955, appellee filed, in the United States District Court for the District of Columbia, a petition for a writ of habeas corpus challenging the validity of her detention on the ground that she was not subject to court-martial jurisdiction (R. 1-4). An order to show cause issued, and on November 22, 1955, the District Court, after hearing argument, entered an order granting the writ of habeas corpus (R. 4-5, 134). It ruled that under the principles of *Toth v. Quarles*, 350 U. S. 11, "the Court must conclude that in this case the petitioner appears to be entitled to a trial by the civil courts. The Court believes that it is required to grant the writ of habeas corpus in the present proceeding" (R. 132).

From the order of the District Court granting the petition for a writ of habeas corpus, appellant took this appeal under 28 U. S. C. 1252.

SUMMARY OF ARGUMENT

I

The Court has jurisdiction of this appeal because, at least in the context of this case, the appellant is an "officer or employee" of the

United States or of an agency thereof within 28 U. S. C. 1252. And this is plainly the kind of case involving enforcement of a general federal statute by an officer acting under federal authority—for which the direct appeal under 28 U. S. C. 1252 was designed. *Fleming v. Rhodes*, 331 U. S. 100, 104.

1. Under familiar principles, the District of Columbia, though it is for many purposes a separate municipal corporation (cf. *Douffas v. Johnson*, 83 F. Supp. 644 (D. D. C.)), is also, in the general sense, an “agency” of the United States. The appellant, therefore, on this basis alone, particularly where he acts under the kind of general federal authority involved here, is among the class of officers or employees to which 28 U. S. C. 1252 applies. Cf. *United States v. Bramblett*, 348 U. S. 503, 509.

2. Appellant is also an agent of the United States directly. He is charged by statute with custody of prisoners of the United States, not merely of the District of Columbia. Commonly performing this role under direction of the Attorney General, he acted in this case for the Air Force. Even state officers holding federal prisoners act as federal agents in performing this function. *Randolph v. Donaldson*, 9 Cranch 76, 85. The appellant’s federal capacity in this case is much clearer.

3. If the appellant were not an “officer” or “employee” or “agency” of the United States, the

decision below, ruling on the validity of the federal power which is the only issue in the case, would presumably have been neither necessary nor binding upon the United States or its other officers. This implication of the appellee's jurisdictional argument helps to demonstrate its fallacy. We think the United States is plainly represented and bound in this case through its officer and employee; by the same token, this appeal lies under 28 U. S. C. 1252.

II

Article 2 (11) of the Uniform Code of Military Justice may be sustained on either or both of two alternative grounds: (1) the power of Congress to make rules governing the armed forces and the war power, and (2) the power to make laws necessary and proper for executing the sovereign authority of the United States in international affairs. Applying only outside the United States, to crimes over which other nations would normally assert jurisdiction, this Article is a statement of the "well-established power of the military to exercise jurisdiction over * * * those directly connected with" the armed forces. *Duncan v. Kahanamoku*, 327 U. S. 304, 313. It deals, as in the present case, with persons who accompany, are closely connected with, and use the facilities of overseas military establishments. It thus differs markedly from an attempt to subject to court-martial jurisdic-

tion civilians who have "severed all relationship" with the military. *Toth v. Quarles*, 350 U. S. 11, 14. For persons, like the appellee, subject to Article 2 (11) for an alleged crime in a foreign land, the real choice is between a foreign trial and an American extraterritorial trial, not between civil and military jurisdiction within the United States. In providing for the exercise of such extraterritorial jurisdiction where the consent of the foreign sovereign could be obtained, Congress can employ courts other than those under Article III of the Constitution, at least where, as here, such courts enforce the basic guaranties of due process.

A. 1. The application of court-martial jurisdiction to civilians accompanying the armed forces has a long history. Dating at least to 1688 in England, such jurisdiction, reaching "sutlers and retailers to a camp," existed under the earliest American Articles of War. While the general extension to civilians "accompanying the armed forces" first appears in 1916, that forty-year-old provision and its present successor, Article 2 (11), are sustained by the solid ground of long history and the compelling necessities of our time. In this era of international tension, when military establishments with large civilian contingents must be deployed around the world, the rationale which formerly justified court-martial jurisdiction over "retainers [or "retailers"] to a camp" justifies such jurisdiction

over civilians "accompanying" the armed forces.

2. Repeatedly sustained by the lower courts, court-martial jurisdiction over civilians accompanying the armed forces has been recognized with apparent approval by this Court. *Duncan v. Kahanamoku*, 327 U. S. 304, 313; *Madsen v. Kinsella*, 343 U. S. 341, 345, 361. The latter case, involving a murder of her soldier-husband by a defendant wife who had accompanied the victim to occupied Germany, was closely similar in its facts to this one. Holding the wife triable by a military government court applying German law, this Court observed that she would also have been triable under Article of War 2 (d), the predecessor of present Article 2 (11). 343 U. S. at 345, 361.

While *Madsen* arose in 1949 and in occupied Germany with which we were not yet technically at peace, it seems highly relevant here. The situation of Mrs. Madsen was very like that of Mrs. Covert; both were "directly connected with" the armed forces. *Duncan v. Kahanamoku*, *supra*, at 313. The availability of the war power with respect to a vanquished Germany may have been more or less necessary than it was when this case arose, when hostilities in Korea were still in progress. But it is clear, in any event, that the war power need not await a state of actual war. *Silesian-American Corp. v. Clark*, 332 U. S. 469, 476. If, as appellee suggests, this power was required to justify court-martial juris-

diction in *Madsen*, we think it equally available to sustain Article 2 (11) in its application to the circumstances of this case.

B. Article 2 (11) of the Uniform Code finds further, and independently sufficient, constitutional basis in the settled power of Congress to confer extraterritorial jurisdiction upon non-Article III courts. In the exercise of this power Congress is not required to provide for indictment and trial by jury. *In re Ross*, 140 U. S. 453.

The principles of *In re Ross* are squarely applicable here. By agreement and statute, England had conceded to American courts-martial the right to exercise jurisdiction over offenses by Americans which would normally be triable in English courts. Article 2 (11) plainly contemplates and confers power to exercise such jurisdiction, being in terms "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law * * *." In *Ross*, this Court upheld a conviction in an American consular court for a murder by a seaman on an American vessel in the port of Yokohama, rejecting a claim of right to indictment and jury trial. Here, with the far more detailed safeguards of the Uniform Code of Military Justice, a person directly connected with the military was properly triable by court-martial overseas. The Constitu-

tion empowers Congress to select this appropriate means of providing for trial in an American rather than a foreign tribunal. Cf. *Madsen v. Kinsella*, *supra*; *Neely v. Henkel*, 180 U. S. 109.

III

The appellee suggests that, if Article 2 (11) could validly be applied in this case, military jurisdiction over her was nevertheless abandoned when she was returned in custody to the United States, where the Court of Military Appeals has reversed her conviction and authorized a rehearing. If this argument ~~had~~ substance, it would mean that, in order to preserve jurisdiction under Article 2 (11), military authorities would have to keep defendants overseas—during trial, appeal, retrial, and subsequent imprisonment. There is no basis for any such requirement.

Under familiar principles, the jurisdiction asserted over appellee in England continues until the termination of proceedings against her. Military appeals and rehearings are merely a continuation of these original proceedings. Moreover, a military prisoner, as such, remains subject to military jurisdiction even after discharge and may be tried by court-martial for offenses during the imprisonment. *Carter v. McClaghry*, 183 U. S. 365; *Kahn v. Anderson*, 255 U. S. 1. *A fortiori*, the appellee remains subject to the military proceedings, not yet completed, which were properly brought against her in this case. The

Air Force has retained custody over her at all times. She ignores this plain fact in her effort to show a voluntary relinquishment of military jurisdiction.

ARGUMENT

I

THE SUPERINTENDENT OF THE DISTRICT OF COLUMBIA JAIL IS AN AGENT AND EMPLOYEE OF AN AGENCY OF THE UNITED STATES WITHIN THE PURVIEW OF 28 U. S. C. 1252

28 U. S. C. 1252, under which this appeal is taken, provides in pertinent part:

Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States * * * holding an Act of Congress unconstitutional in any civil action, suit, or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

In her motion to dismiss or affirm, the appellee, conceding that the District Court held unconstitutional an act of Congress in a civil proceeding for a writ of habeas corpus, rests her attack on the jurisdiction of the Court on the ground that appellant, Superintendent of the District of Columbia Jail, is not an employee of the United States within the purview of the statute. We believe, however, that since the Superintendent is an employee of the District of Columbia, which, at least in performing the general federal func-

tions here involved, is an agency of the United States, and since appellant is also, in the context of this case, an agent of the United States directly, this appeal is authorized under 28 U. S. C. 1252. Moreover, while jurisdictional problems may be technical and we treat the one here accordingly, it bears emphasis that this is a case of the kind to which 28 U. S. C. 1252 was plainly intended to apply. See *Fleming v. Rhodes*, 331 U. S. 100, 104, fn. 2, *infra*, pp. 15-16. At stake is the validity of a federal statute of general application, administered by federal officers, and properly and expectably defended in this suit by such officers. As the appellee observes (*Motion to Dismiss or Affirm*, p. 6), the Attorney General of the United States, through his authorized delegees—not the District of Columbia Corporation Counsel—has defended this action from the outset. Thus, the failure of the lower court to certify the cause to the Attorney General may not be attributed merely to the fact that the Attorney General, through his representative, happened only coincidentally to be already in the case (see Appellee's Motion, *supra*, p. 6, fn. 6). The true explanation is that there was no occasion for such notification because, as a matter of practical fact as well as in legal contemplation, the defendant in this case has at all pertinent times been an officer or employee of the United States defending this action for the

United States under the statute attacked by the appellee as unconstitutional.

1. The District of Columbia is a distinct municipal corporation which for many purposes is not to be regarded as an agency of the United States. See, e. g., *Bundy v. United States*, 21 C. Cls. 429; *Douffas v. Johnson*, 83 F. Supp 644 (D. D. C.). In the context of this case, however, performing a general federal function, and not one pertaining peculiarly to the local government, the District and its Jail Superintendent comprised a United States "agency" within 28 U. S. C. 1252. This statute speaks of a suit or proceeding "to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party." Considering the punctuation and the manifest purpose of the statute to afford the United States Government as a whole an opportunity for prompt review of constitutional issues, particularly where the challenged legislation is of general applicability,² the phrase "employee thereof" must refer to an employee of an agency of the United States, as well as an employee of the United States as such. And there can be no doubt

¹ *Barnes v. District of Columbia*, 91 U. S. 540; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1; *District of Columbia v. Woodbury*, 136 U. S. 450; *District of Columbia v. John R. Thompson Co., Inc.*, 346 U. S. 100.

² In construing the predecessor statute of August 24, 1937, c. 554, 50 Stat. 752, 28 U. S. C. (1940 ed.) 349a, this Court said, in *Fleming v. Rhodes*, 331 U. S. 100, 104: "The Congress intended prompt review of the constitutionality of

that appellant can properly be called an employee of an agency of the United States.

There is nothing strange in treating the District of Columbia as an agency of the United States for the purposes which concern us here. In describing the relationship of the District of Columbia Government to the Government of the United States, this Court has repeatedly adverted to the agency concept implicit in every municipal corporation. In the *Metropolitan R. Co.* case, *supra*, p. 8, it said:

All municipal governments are but *agencies* of the superior power of the State or government by which they are constituted, and are invested with only such subordinate powers of local legislation and control as the superior legislature sees fit to confer upon them. The form of those *agencies*, and the mode of appointing officials to execute them are matters of legislative discretion. [Emphasis added.]

federal acts." The Court quoted from H. Rep. No. 212 (75th Cong., 1st Sess.), p. 2, the following:

"The importance to the Nation of prompt determination by the court of last resort of disputed questions of the constitutionality of acts of Congress requires no comment."

And from S. Rep. No. 963 (75th Cong., 1st Sess.), pp. 3-4:

"The United States is not excluded by the principle thus stated, from drawing the judicial power to its proper assistance either as an original party, or as an intervenor, when, in private litigation, decision of the constitutional question may affect the public at large, may be in respect of matters which by the Constitution are entrusted to the care of the Nation, and concerning which the Nation owes a duty to all the citizens of securing to them their common rights."

In *District of Columbia v. Woodbury*, *supra*, p. 452, the Court, discussing the Board of Public Works of the District of Columbia, referred to the agency aspect of municipal corporations when it wrote:

* * * Although that Board was dependent upon both Congress and the Legislative Assembly of the District, and was the *hand and agent* both of the United States and of the District, it was held to be the representative and a part of the municipal corporation created by the act of 1871 * * *. [Emphasis added.]

And the recent discussion in *District of Columbia v. Thompson Co.*, *supra*, p. 109, makes it clear that the agency concept implicit in municipal corporations is applicable to the Government of the District of Columbia when it is acting in behalf of the Government of the United States. Similarly, the court in *Penn Bridge Co. v. United States*, 29 App. D. C. 452, 457, said:

* * * The government of the District of Columbia is simply an agency of the United States for conducting the affairs of its government in the Federal District * * *.

This Court's recent decision in *United States v. Bramblett*, 348 U. S. 503, is instructive here in illustrating how the word "agency", like so many others in the law, takes color from its context. There, the Court was concerned with the criminal statute punishing false statements

in matters within the jurisdiction of "any agency of the United States." In this connection the definition of the word "agency" in 18 U. S. C. 6 was examined. That section provides:

* * * The term "agency" includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense.

The Court held that the context of the problem required "an unrestricted interpretation" of the criminal statute. 348 U. S. at 509. Here, we may note the general definition of agency for the purpose of Title 28 in 28 U. S. C. 451, which is identical with that of 18 U. S. C. 6, quoted above. And in the present context, it seems clear that the term should apply in its fullest sense in this case, which is one of the very type for which Congress designed the direct appeal provisions of 28 U. S. C. 1252.

Congress, in exercise of its constitutional power under Article I, Section 8, Clause 17, over the seat of government of the United States, included the District of Columbia within the definition of "agency" in the Legislative Reorganization Act of 1949 (63 Stat. 203, 205).³ Pursuant to the authority granted him under this Act,

³ 5 U. S. C. 1332 to 1332-15.

the President promulgated Reorganization Plan No. 5 of 1952, providing for the reorganization of the Government of the District of Columbia.⁴ Under this plan the functions of the Board of Public Welfare, which had "complete and exclusive control and management" of the Washington Asylum and Jail,⁵ together with the functions of the officers thereof, were transferred to the Board of Commissioners of the District of Columbia. Of the three Commissioners comprising the Board, two are appointed by the President with the advice and consent of the Senate⁶ and one, the Engineer Commissioner, is appointed by the President from the ranks of the Corps of Engineers of the United States Army.⁷ The Commissioners, authorized to delegate the functions assigned to them by the Reorganization Plan, issued District of Columbia Reorganization Order No. 34, effective June 21, 1953, whereby a Department of Corrections under a Director was created and charged with responsibility for the maintenance of the District of Columbia Jail.⁸ Appellant, as Superintendent of the Jail, is responsible to the Director of the Department of Corrections and, through

⁴ 3 C. F. R. 1952 Supp., p. 124.

⁵ D. C. Code, 1951 ed. 3-106; 24-409.

⁶ D. C. Code, 1951 ed. 1-201.

⁷ D. C. Code, 1951 ed. 1-202, 203.

⁸ See Reorganization Order No. 34, Appendix to Title 1 of Supp. III of D. C. Code, 1951 ed., p. 34.

him, to the Commissioners. The Commissioners are officers of the United States by virtue of Article II, Section 2 of the Constitution, and the Department of Corrections, like the Board of Public Works in *District of Columbia v. Woodbury, supra*, would normally be termed an agency of the United States. There is therefore good ground for concluding that this proceeding against appellant, their employee, is within 28 U. S. C. 1252, particularly since the purposes of that statute would be fully served by such a holding.

2. Appellant is also an agent of the United States directly. His functions as Superintendent of the District of Columbia Jail mark him as a custodial agent of the United States. Under the statutes he is obliged to accept as prisoners for safekeeping those persons assigned to him, whether they were convicted in federal courts for offenses against the United States or by courts-martial for military offenses. His duty to accept persons convicted of offenses against the United States arises under Section 410 of Title 24, D. C. Code, 1951 ed., which provides:

The Board of Public Welfare is hereby authorized and directed to receive and keep in the Washington Asylum and Jail all prisoners committed thereto for offenses against the United States.*

* Under Reorganization Plan No. 5, *supra*, p. 19, the authority of the Board of Public Welfare was transferred to the Board of Commissioners of the District of Columbia.

When appellant exercises his power to detain federal prisoners, he does so under the direction of the Attorney General by virtue of Section 425 of Title 24, D. C. Code, 1951 ed., which provides:

All prisoners convicted in the District of Columbia for any offense, including violations of municipal regulations and ordinances and Acts of Congress in the nature of municipal regulations and ordinances, shall be committed, for their terms of imprisonment, and to such types of institutions as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinements where the sentences of all persons shall be served. The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the District of Columbia Government, the federal government, or otherwise, or whether within or without the District of Columbia. The Attorney General is also authorized to order the transfer of any such person from one institution to another if, in his judgment, it shall be for the well-being of the prisoner or relieve overcrowding or unhealthful conditions in the institution where such prisoner is confined, or for other reasons. [July 15, 1932, ch. 492, § 11, as added June 6, 1940, 54 Stat. 244, ch. 254, § 8.]

Not only is appellant directed by these code sections to act under instructions of the Attorney

General in detaining prisoners,¹⁰ but the Attorney General is empowered to give such instructions by 18 U. S. C. 4082, which provides in part:

Persons convicted of an offense against the United States shall be committed, for such term of imprisonment as the court may direct, to the custody of the Attorney General of the United States or his authorized representative, who shall designate the places of confinement where the sentences shall be served.

The Attorney General may designate any available, suitable, and appropriate institutions, whether maintained by the Federal Government or otherwise, or whether within or without the judicial district in which the person was convicted.

* * * * *

Since "[c]rimes committed in the District are not crimes against the District, but against the United States" (*Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1, 9), all offenders convicted in the District of Columbia are, by virtue of the quoted section, in the custody of the Attorney General. Thus it follows that, even as to the District of Columbia prisoners in its own jail, appellant acts under and for the Attorney General as

¹⁰ The duties imposed on appellant under D. C. Reorganization Order No. 34, *supra*, fn. 8, are principally concerned with the maintenance and care of the physical properties of the jail. Compare Section 420 with Section 421, both of Title 24, D. C. Code, 1951 ed. *

agent of the United States in regard to their custodial detention.

The fact that appellee was a military prisoner convicted by court-martial does not alter appellant's status as agent of the United States in respect to her safe-keeping. In this case appellant is not less an agent of the United States when he detains a prisoner on request of the Air Force than when he detains a prisoner on direction of the Attorney General; both, in their own spheres, equally represent the United States.

Appellant was authorized to receive custody of appellee from the Air Force on its request and to hold her in detention under the authority of 18 U. S. C. 4083, which states:

Persons convicted of offenses against the United States or by courts-martial and sentenced to terms of imprisonment of more than one year may be confined in any United States penitentiary.

The Air Force, in requesting appellant to accept custody of appellee, acted under the authority of Article 10, Uniform Code of Military Justice (50 U. S. C. 564), which provides in part:

Any person subject to this chapter charged with an offense under this chapter shall be ordered into arrest or confinement, as circumstances may require * * *.

Since the Air Force had no adequate or suitable facilities for the detention of women prisoners in the Washington, D. C., area in which to hold

appellee pending her rehearing at Bolling Air Force Base, it utilized the federal civilian detention institution in the District. Hence, in detaining appellee, appellant, who normally restrains prisoners under directions from the Attorney General, acted in this case on request of the Air Force.

That appellant, though an employee of the District of Columbia, is an agent of the United States when he detains federal prisoners is confirmed by the rulings of courts in analogous cases. For example, a state or local official who holds a federal prisoner for federal officers acts as a federal agent in performing this function. This Court, in *Randolph v. Donaldson*, 9 Cranch 76, 86, stated:

* * * For certain purposes, and to certain intents, the state jail, lawfully used by the United States, may be deemed to be the jail of the United States, and that keeper to be keeper of the United States.

This case was followed in *United States v. Hoffman*, 13 F. 2d 269, 272 (C. A. 2), where the court wrote:

* * * The state jail is to be deemed the jail of the United States for this purpose. The keeper of the jail is the keeper of the United States. Those charged with responsibility for the execution of the writs of the United States court are to that extent and for that purpose officers of the United States court, and are subject to

punishment for contempt for disobedience or disregard of the warrants or orders committing such prisoners to their custody. *Randolph v. Donaldson*, 9 Cranch, 77, 863 L. Ed. 662; *Sweepston v. United States*, 251 F. 205, 163 C. C. A. 361; *In re O'Rourke* (D. C.) 251 F. 768; *Ex parte Shores* (D. C.) 195 F. 627; *In re Birdsong* (D. C.) 39 F. 599; *Servis v. Marsh* (C. C.) 38 F. 794.

See also *In re Ross*, 140 U. S. 453, 454-455, 459. Appellant, who can be legally charged by the Attorney General with responsibility for the safekeeping of federal prisoners, had, in this case, responsibility for the detention of appellee, a federal military prisoner. This obligation rendered appellant, by operation of law, an agent of the United States.

Even counsel for appellee has by his actions acknowledged that appellant was an agent for the Air Force. By a letter addressed to the commanding officer of the Bolling Air Base, dated July 15, 1955 (at the time appellee was in the District of Columbia jail), requesting the military authorities to transfer appellee to a suitable medical facility for observation and examination as to her present mental condition (R. 124), counsel for appellee implicitly acknowledged that appellant was acting as agent for and under instructions of the United States Air Force. The Air Force, by negotiating with the Superintendent of St. Elizabeths Hospital for examination

of appellee and causing her transfer to the hospital (R. 124-128), demonstrated that it did control the custody of appellee through the agency of the appellant. As a practical matter, all parties concerned with the custody of appellee deemed her to be a federal military prisoner, and viewed appellant as an agent of the United States in detaining her.

3. Finally, the implications of the appellee's contrary view further buttress our conclusion that, at least in the context of this case, the appellant must be viewed as an "officer or employee" or "agency" of the United States. Unless this is so, it would appear difficult to find a basis for holding the United States or any of its officers bound by the decision below. On the appellee's view, there was no occasion to reach the issue of federal power in this case because appellant does not exercise federal power. And though the District Court ruled on this question, the only one the parties have ever considered to be involved, the issue—under appellee's theory—would remain untried as to any proper federal defendant whose presence could conclude it.

We would not even suggest that the constitutionality of the appellee's trial under Article 2 (11) cannot be finally determined, against the United States and all its agents, in the present litigation. We urge the contrary. The reasoning which requires our conclusion leads equally to the

conclusion that this is a case to which the direct appeal provisions of 28 U. S. C. 1252 apply.¹¹

II

ARTICLE 2 (11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS A VALID EXERCISE OF THE POWER OF CONGRESS TO MAKE RULES FOR THE GOVERNMENT AND REGULATION OF THE LAND AND NAVAL FORCES, THE WAR POWER, AND THE POWER TO MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE SOVEREIGN AUTHORITY OF THE UNITED STATES TO MAINTAIN RELATIONS WITH OTHER SOVEREIGNTIES

Article 2 (11) of the Uniform Code of Military Justice (*supra*, p. 3) confers authority upon

¹¹ It may be noted that the appellant on December 19, 1955, filed a notice of appeal from the District Court's decision to the Court of Appeals for the District of Columbia Circuit (*Reid v. Covert*, C. A. D. C. No. 13,228). On March 16, 1956, a preliminary record was filed in the Court of Appeals consisting of the notice of appeal, docket entries, and judgment of the District Court, and counsel moved for an extension of time to file a complete record to fifteen days after disposition of the present appeal to this Court. On March 22, 1956, the appellee filed an objection to this motion, arguing that the appeal to this Court divested the Court of Appeals of jurisdiction. We think it clear, however, that appellee cannot prevail on both arguments—*i. e.*, in urging that appeal does not lie to this Court but that the attempt to bring it here has destroyed the jurisdiction of the Court of Appeals as well.

Believing that appeal properly lies here under 28 U. S. C. 1252, we have nevertheless undertaken to protect the Government's interests by preserving our appeal to the Court of Appeals. If we have erred in our view on this issue, this Court may see fit to treat our Statement as to Jurisdiction as a petition for certiorari before judgment or to entertain such a petition which can be promptly filed if there appears to be any occasion therefor. Cf. *Stainback v. Mo Hock Ke Lok Po*, 336 U. S. 368, 371.

courts-martial of the armed forces of the United States to try persons serving with, employed by, or accompanying those forces outside the continental limits of the United States and certain of its territories. Unlike the provision invalidated in *Toth v. Quarles*, 350 U. S. 11, which applied to civilians who had "severed all relationship" (p. 14; see also p. 13) with the armed forces, the Article here in question is part of the "well-established power of the military to exercise jurisdiction over * * * those directly connected with such forces" (*Duncan v. Kahana-moku*, 327 U. S. 304, 313; see also *Madsen v. Kinsella*, 343 U. S. 341, 345, 361). In addition, as we shall show (*infra*, pp. 48-65), because the real choice in the situation to which Article 2 (11) applies is between trial by an American court and trial by a foreign court, this statute finds independently sufficient basis in the settled power of Congress to provide for the exercise of such extraterritorial jurisdiction by the United States through tribunals other than those created under Article III of the Constitution (*In re Ross*, 140 U. S. 453).

The twentieth-century problems which gave rise to Article 2 (11) and its forty-year-old precursor (Article 2 (d) of the Articles of War of 1916) are familiar ones. In the troubled circumstances of our times our national security requires that we station in many foreign nations large military and

naval establishments. Sizable civilian contingents closely accompany, live with, and form integral parts of these establishments. Substantial numbers of highly trained specialists and technicians, whose skills are not available in the uniformed services and cannot be economically supplied by training those in uniform, are essential to the daily problems of maintenance and administration arising from the intricate technology of modern warfare. Equally significant to the armed forces is the need to sustain the morale of troops stationed in many and remote corners of the earth—morale which, even apart from the calls of humanity, promotes stability of the complement by permitting longer periods of overseas assignment and encourages reenlistments. To this end, the services have transported at military expense hundreds of thousands of dependents, and currently there are some 250,000 dependents abroad. This policy serves an obviously sound military purpose. These dependents and the 20,000 technicians and other employees overseas give rise to the questions of discipline and international harmony to which Article 2 (11) is addressed.

Confronting these questions, the Congress which enacted and the President who approved Article 2 (11), carrying forward what had formerly been Article of War 2 (d), had to deal with a complex of concerns. It was evident that these

large numbers of civilians could not and would not be free of all legal sanctions governing their conduct. For many crimes—like the alleged murder here involved—the foreign country where they were stationed would probably insist on trying them in its own tribunals according to its own law, at least in the absence of agreement or action to achieve another result. The security, safety and integrity of the military establishments located abroad, which are plainly liable to possible injury by the many civilians living and working intimately with those in uniform, were significant and special concerns of this country, more so than of the friendly state receiving our forces. Misconduct by such civilians abroad, not less than misconduct by those in service, could cause international friction in areas where harmony and cooperation are of the highest importance.

Weighing such considerations, Congress and the President reenacted, and adapted to the international scene (see *infra*, pp. 49–61), the solution now embodied in Article 2 (11). As we have stated, we argue that two independent lines of authority sustain this reasonable provision: *first*, the combination of the power “To make Rules for the Government and Regulation of the land and naval forces” (Constitution, Art. I, Sec. 8, Cl. 14), the war power (*id.*, Cl. 11), and the power to make laws “necessary and proper” for the execution of these powers (*id.*, Cl. 18); *second*, the well-settled power to exercise extraterritorial

jurisdiction, through non-Article III courts, over crimes committed abroad by Americans. The result for persons like appellee is a trial by fellow-citizens, safeguarded by basic guaranties of due process and American procedure (*Burns v. Wilson*, 346 U. S. 137, 142-143), rather than the likely alternative of a trial in a foreign court under foreign auspices. That choice, we submit, lay well within the power of Congress under the Constitution.

A. ARTICLE 2 (11) IS A VALID EXERCISE OF THE POWER TO MAKE RULES GOVERNING THE ARMED FORCES AND OF THE WAR POWER

Appellee was overseas because her husband, a member of the United States Air Force, was sent abroad in fulfillment of American military commitments and because the American military authorities had determined that it furthered the morale of the armed forces stationed abroad to permit their families to accompany them. Cf. *Madsen v. Kinsella*, 343 U. S. 341, 345, 361. Plans for and the cost of her transportation to England had been arranged and provided by the Air Force. She travelled by military surface transport. After arrival in England, appellee and her husband were assigned public quarters and she was issued appropriate authorization for commissary and post exchange privileges. She was accorded the use of, and did use, military medical facilities (R. 31). In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described

in Article 2 (11) are part of the American military contingent abroad. Their actions directly affect the reputation, the status, and the discipline of our armed forces overseas, as well as their continued acceptability to the host governments. It is, therefore, fitting that civilians who accompany the armed forces to foreign duty stations be subject to discipline under American military law. That is the status which Congress deliberately elected to give them. A constitutional basis for this legislative choice is furnished by Article I, Section 8, Clause 14, together with the "Necessary and Proper" Clause and the general war power. History and judicial precedent lend their weight in support.

1. The concept of subjecting to military jurisdiction civilians accompanying armies is not new. The Articles of War of King James II of England, promulgated in 1688, contemplated the trial and punishment of civilians by courts-martial when it provided:¹²

ART. XLV

No Officer or Soldier shall be a Victualler in the Army upon pain of being punished at discretion.

ART. XLVI

No Victualler or seller of Beer, Ale, or Wine belonging to the Army, shall Entertain any Soldier in his House, Booth, Tent,

¹² Winthrop, *Military Law and Precedents*, 2d ed., Reprint 1920, p. 926.

or Hutt after the Warning-Piece, Tattoo, or Beat of the Drum at night, or before the Beating of the Reveilles in the morning; nor shall any Soldier within that time be any where but upon his Duty, or in his Quarters, upon pain of Punishment both to the Soldier and Entertainer at the Discretion of a Court-Martial.

In the British Articles of War of 1765, which served as a model for the early American Articles, there appeared Article XXIII of Section XIV, which provided: ¹³

All Suttlers and Retainers to a Camp, and all persons whatsoever serving with Our Armies in the Field, though not inlisted Soldiers, are to be subject to orders, according to the Rules and Discipline of War.

The First Articles of War of the United States, enacted by the Continental Congress on June 30, 1775, provided: ¹⁴

XXXII. All suttlers and retailers to a camp, and all persons whatsoever, serving with the continental army in the field, though not inlisted soldiers, are to be subject to the articles, rules, and regulations of the continental army.

A similar provision was contained in the 1776 Articles of War ¹⁵ which remained in effect, with

¹³ Winthrop, p. 941.

¹⁴ Winthrop, p. 956.

¹⁵ Winthrop, p. 967 (Art. 23).

irrelevant changes, until almost two decades after the adoption of the Constitution.¹⁶

Against this background, the constitutional provision for the government and regulation of the armed forces must be read as necessarily sanctioning the trial-by court-martial of certain classes of civilians intimately related to the armed forces. Cf. *Dynes v. Hoover*, 20 How. 65, 79 ("Congress has the power to provide for the trial and punishment of military and naval offenses in the manner then and now practiced by civilized nations"). It is significant, too, that every successive reenactment of the Articles of War, including the Uniform Code of Military Justice of 1950, has contained an article making civilians "serving" with the army subject to military law.

The word "accompanying"—as distinguished from "serving"—which now appears in Article 2 (10) and (11) of the Uniform Code of Military Justice was first introduced into military law during the general revision of the Articles of War in 1916. Major General Enoch H. Crowder, then The Judge Advocate General, who had urged this revision, after explaining to the House Committee

¹⁶ Winthrop, p. 99, n. 94, states that "Members of the families of soldiers or officers, commorant with the army, would be amenable as camp-followers. Simmons § 71, note, cites the case of Hannah Fitchet, a soldier's wife, convicted of manslaughter by a general court-martial in India in 1825. That the *wife of an officer* may be triable by court-martial as a camp-follower, see Hough, (P.) [Precedents in Military Law] 629."

on Military Affairs that it was intended thereby to include camp followers and persons serving with or accompanying the Army in the field, said: ¹⁷

There is nothing new in the article in subjecting these several classes to the provisions of article 65. It is a jurisdiction which has always been exercised. When any person joins an army in the field and subjects himself by that act to the discipline of the camp he acquires the capacity to imperil the safety of the command to the same degree as a man under the obligation of an enlistment contract or of a commission.

Following the failure of the revision in the 62d and 63d Congresses, General Crowder appeared before the Senate Committee on Military Affairs in the 64th Congress and testified: ¹⁸

In the present condition of our Articles of War "retainers to the camp" (i. e., officers' servants, newspaper correspondents, telegraph operators, etc.) and "persons serving with the armies in the field" (i. e., civilian clerks, teamsters, laborers, interpreters, guides, contract surgeons, officials, and employees of the provost marshal general's department, officers and men employed on transports, etc.) are made subject to the Articles of War only during the

¹⁷ Hearings before the House Committee on Military Affairs, 62d Cong., 2d Sess., on H. R. 23628, p. 61.

¹⁸ S. Rep. No. 130, 64th Cong., 1st Sess., pp. 37-38.

period and pendency of war and while in the theater of military operations. A number of persons who manage to accompany the Army, not in the capacity of retainers or of persons serving therewith, are not included. They constitute a class whose subjection to the Articles of War is quite as necessary as in the case of the two classes expressly mentioned. Accordingly the article has been expanded to include also persons accompanying the Army. The existing articles are further defective in that they do not permit the disciplining of these three classes of camp followers in time of peace in places to which the civil jurisdiction of the United States does not extend and where it is contrary to international policy to subject such persons to the local jurisdiction, or where, for other reasons, the law of the local jurisdiction is not applicable, thus leaving these classes practically without liability to punishment for their unlawful acts under such circumstances—as, for example, where our forces accompanied by such camp followers are permitted peaceful transit through Canadian, Mexican, or other foreign territory, or where such forces so accompanied are engaged in the nonhostile occupation of foreign territory, as was the case during the intervention of 1906-7 in Cuba.

Congress adopted the changes suggested by General Crowder by enacting Article 2 (d) of the Articles of War of 1916, which provided:

(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles.¹⁹

After full consideration by an eminent committee of experts and by Congress, Article 2 (11) of the present Uniform Code—reflecting the fact that, while there is no war, there is a world situation far short of perfect “peace,” requiring large military commitments across the world—carried forward the provision that civilians “accompanying the armed forces” overseas should be subject to court-martial jurisdiction.

In this century a broadened class of civilians has come to have the kind of direct relationship to the military which is familiar today. Congress dealt with the problems these changed circumstances create in Article 2 (d) of the 1916 Articles of War, which has become Article 2 (11) of the Uniform Code.²⁰ The rationale which in 1776 made “retainers to a camp” subject to court-martial jurisdiction—their close connection with

¹⁹ The 1916 provision was reenacted in 1920, 41 Stat. 787.

²⁰ It should be noted that appellee agrees (Motion to Dismiss or Affirm, pp. 7-10) that such civilians could always be tried by court-martial in time of war or actual hostilities. See also *infra*, pp. 40-44.

the army and direct effect on military discipline—applies to civilians accompanying the army overseas in the circumstances of today. The inclusion of such civilians as subject to military jurisdiction is a recognition by the military and by Congress that in 1916, and even more in 1950, the nature of the American army and of American military commitments had changed from the situation that existed in 1776. Congress recognized in 1916 that the United States was no longer an isolated nation insulated from Europe and Asia by ocean barriers, but that our armed forces, consisting of military and civilian personnel, might be deployed throughout the world even in time of peace. Congress understood that, should world events develop to necessitate a global disposition of the American armies, every civilian who accompanied them would be an unofficial emissary of the United States to some foreign land, adding his contribution to the overall impression created by our troops stationed there and influencing the conduct of those servicemen. It was deemed necessary and proper that such accompanying civilians who went abroad under military auspices, commingled with military personnel and enjoying the privileges of military facilities, should, because of their great potential impact on military discipline, be subject to military law. In 1950, when the necessity of keeping American armies overseas for lengthy periods was clearly envisaged, Congress reaffirmed

its recognition that the classes of civilians who would, in both American and foreign eyes, be deemed part of the American military contingent abroad includes, not only civilians working with the army; but dependents who are, in terms of contemporary realities, an equally necessary and intimate part of our military contingent overseas.

The legislative history of Article 2 (11) reveals that Congress understood that dependent wives and children of servicemen stationed abroad, who accompany their husbands and fathers from place to place, would fall within the ambit of the term "accompanying" and be subject to military law. This effect of Article 2 (11) was pointed out to the Subcommittee of the Committee on Armed Forces during its hearings on H. R. 2498 by Mr. Larkin, General Counsel of the Department of Defense, in the following exchange with Congressman Elston and Mr. Smart:²¹

Mr. ELSTON. It would not cover the families of soldiers, would it?

Mr. LARKIN. *I think it would, if they were dependents.*

Mr. ELSTON. Well——

Mr. LARKIN. If they were living with him in some quarters furnished and moved from place to place with him, based on the service——

* * * * *

²¹ Hearings on H. R. 2498, 81st Cong., 1st Sess., before Subcommittee of the Committee on Armed Services of the House of Representatives, pp. 876-877.

Mr. BROOKS. I just received today a letter from a mother saying she was going over to visit her daughter who is the wife of an officer in Germany. When she arrives over there the court, that is the military court, would have concurrent jurisdiction under this code with the court-martial in the trial of the case if one should arise, would they not?

Mr. LARKIN. The occupation court would have jurisdiction over her if she committed any crimes.

Mr. SMART. I do not see where that particular person would come under the code. She is not serving with, employed by, or accompanying the forces.

Mr. LARKIN. That is right.

Mr. SMART. She would not, in any case, in my opinion, be subject to this code. *Whereas the family of a soldier, be it officer or private, does accompany him and he certainly is part of the forces.* I do not think it could be considered that this provision would be broad enough to cover the relative who goes for a mere visit. [Emphasis added.]

2. The power of Congress to provide for trial by court-martial of civilians accompanying our armed forces overseas has been recognized by this Court as "well-established" (*Duncan v. Kahanamoku*, 327 U. S. 304, 313; and see *Madsen v. Kinsella*, 343 U. S. 341, 345, 361), and has been repeatedly enforced by the lower federal courts. *Hires v. Mikell*, 259 Fed. 28 (C. A. 1), certiorari

denied, 250 U. S. 645; *Perlstein v. United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, certiorari dismissed, 328 U. S. 822; *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Rubenstein v. Wilson*, 212 F. 2d 631 (C. A. D. C.); *Ex parte Gerlach*, 247 Fed. 616 (S. D. N. Y.); *Ex parte Falls*, 251 Fed. 415 (D. N. J.); *Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.); *In re Berue*, 54 F. Supp. 252 (S. D. Ohio); *Grewe v. France*, 75 F. Supp. 433 (E. D. Wis.); *United States v. Burney*, U. S. C. M. A. No. 7750, decided March 30, 1956 (reprinted in Appendix B to the Government's brief in No. 713); *Krueger v. Kinsella*, 137 F. Supp. 806, pending on certiorari, No. 713, this Term. We recognize, of course, that this Court's pronouncements on the subject—both in *Duncan*, preceding the Uniform Code, and in *Madsen*, which followed—are, strictly speaking, dicta. We invoke them, nevertheless, because they appear to be considered declarations on matters of grave import and they represent, in our judgment, correct statements of the governing constitutional rule.

The facts in *Madsen v. Kinsella*, *supra*, with distinctions soon to be noted, were strikingly similar to the ones in this case. See 343 U. S. at 343-344. There, as here, "a civilian dependent wife of a member of the United States Armed Forces," living in quarters furnished by military authorities and using facili-

ties furnished by the military for such persons, was charged with the murder of her husband. The differences from this case were (1) that, at that time (1949), there was still no treaty of peace with Germany, and (2) that Germany, where the events occurred, was occupied, not friendly territory like England in this case, which consented to the presence of our troops and those accompanying them and consented to the exercise of American military jurisdiction over such persons. On those facts, while holding that Mrs. Madsen could be tried by an American occupation court applying German law, this Court stated unequivocally that she could also have been tried by court-martial under Article of War 2 (d), the precursor of present Article 2 (11). 343 U. S. at 345, 361.

Arguing that Article 2 (11) is so plainly invalid that the attempt to sustain its enactment is unsubstantial, the appellee here dismisses *Madsen v. Kinsella* (Motion to Dismiss or Affirm, p. 10, fn. 9) as "a war-power case involving occupied territory * * * [which] is therefore irrelevant to the present problem." But the rigid circumscription of the war power and the negation of the rationale of the *Madsen* opinion implicit in that argument find no support either in constitutional precedent or in the practical realities with which we are concerned.

First, as a factual matter, there is no substantial distinction between Mrs. Madsen and the

context of her crime, on the one hand, and Mrs. Covert's case, on the other. Both were dependent wives accompanying their soldier husbands, using housing and other facilities supplied by the military. Both were in a real sense part of the military establishment; both presented problems of very similar concern to the military commands in which they lived. As to the broader context, the questions of war and peace and occupation to which the appellee refers, it would be hard to say whether the difficulties of dealing with a prostrate Germany prior to a formal declaration of peace presented a more or less fitting occasion for application of the war power than did the continuing tensions of war and threatened war which formed the background and basis for Mrs. Covert's sojourn in England. See also *infra*, pp. 49 ff.²²

In any event, it seems sufficient to recall that the war power is not confined in its operation to periods when the nation is engaged in formal war or actual hostilities: *Ashwander v. Tennessee Valley Authority*, 297 U. S. 288, 326, 327-328; *Silesian-American Corp. v. Clark*, 332 U. S. 469, 476; *United States v. City of Chester*, 144 F. 2d 415, 418-419 (C. A. 3). It will not be denied, we

²² It will be recalled that the Korean conflict, at least very like a war, had not ended at the time of the alleged murder in this case, March 10, 1953. Cf. *United States v. Bancroft*, 3 U. S. C. M. A. 3; *United States v. Ayres*, 4 U. S. C. M. A. 220.

think, that the threat of war and the effort to insure peace by preparations for war were very much in the minds of those who enacted both the 1916 Article of War 2 (d) and Article 2 (11) of the Uniform Code of Military Justice. There is no basis for the suggestion that the war power may not be invoked in support of Article 2 (11)—which can only operate abroad—and its application in the circumstances of this case. As the *Madsen* case shows, the general war power which sustains our farflung establishments overseas and our complex of foreign defensive measures likewise has its role in the government and control of civilians who accompany the forces on these missions abroad.

When the facts of war and peace in 1956 are considered, the appellee's curt dismissal of the war power (in its combination with Article I, Section 8, Clause 14, and the "Necessary and Proper" Clause) is seen to be erroneous; and her reliance upon the eminent authority of Colonel Winthrop (Motion to Dismiss or Affirm, p. 8) fails for the same reason. Writing at the end of the last century, Colonel Winthrop recognized the propriety of trying by court-martial civilians, including dependents, accompanying the armed forces in wartime. *Military Law and Precedents*, p. 99, fn. 94, quoted *supra*, fn. 16, p. 33. To be sure, he drew the constitutional line at the end of war (Winthrop, p. 107). But the world about which Colonel Winthrop wrote no longer exists.

The military situation today, with military bases around the world heavily populated by accompanying civilians, is one he neither saw nor appears to have foreseen. His concern was solely with civilians *in the United States* and with the extension of court-martial jurisdiction over *them*. His treatise gives no real indication of his views as to court-martial jurisdiction over civilians with the armed forces overseas in the circumstances which arose after World War II.²³ One can surmise from his discussion of constitutionality that Winthrop would not have been as hostile to Article 2 (11) as appellee believes.

We submit, therefore, that the lower court cases sustaining the exercise of court-martial power over civilians accompanying the armed forces overseas are very much in point here, even though they may have arisen in time of war or in occupied territory, for formal war does not exhaust the occasions for the exercise of the war power. By the same token, this Court's expressions approving this conclusion in *Duncan* and *Madsen* are more nearly controlling than the recent decision in *Toth v. Quarles*, 350 U. S. 11. Toth, months before his arrest for trial by court-martial, had "severed all relationship with the military"

²³ Similarly, it seems clear that the rulings of The Judge Advocate General cited by appellee (Motion to Dismiss or Affirm, p. 8) dealt with civilians *within the United States*, who are normally protected by the Sixth Amendment's guaranty of trial by jury.

(350 U. S. at 14) and had returned to the United States to live as a full-fledged civilian. Mrs. Covert, like other civilians accompanying the armed forces and held triable by court-martial in cases this Court has cited with approval, was still "directly connected with such forces" (*Duncan v. Kahanamoku, supra*, at 313²⁴) at their station in a foreign land. Moreover, in *Toth*, the Court stressed that it would have been feasible and constitutional to provide for trial in the federal courts in the United States of ex-servicemen like the defendant there. 350 U. S. at 20-21. Here, the existence of such an alternative is less likely and would, in any event, not detract from the validity of the choice Congress made. For in waiving its right to exercise the jurisdiction it would normally claim for itself, a foreign nation has an obvious interest in prompt and certain trial, usually within its own borders, of offenses alleged to have occurred there.²⁵ And, as we show

²⁴ Citing, in fn. 7, *Ex parte Gerlach, supra*; *Ex parte Falls, supra*; *Ex parte Jochen, supra*; *Hines v. Mikell, supra*.

²⁵ Compare the "understanding" of the British, in concluding the agreement here involved, that for offenses against their civilian population United States forces would provide a prompt and open (except for security cases) trial close to the spot in the United Kingdom where the offense was alleged to have occurred. Note from his Majesty's Government, Appendix, *infra*, p. 80. While the alleged offense in this particular case was not against a British civilian, the point remains that Great Britain or other foreign countries would probably be more reluctant to yield their normal right to exercise jurisdiction had Congress provided, instead of Article 2 (11), for trial of such cases in the United

below (pp. 48-65), Congress had long and ample precedent for exercising such extraterritorial jurisdiction through courts created otherwise than under Article III of the Constitution.

Summarizing to this point, we submit that the extension of court-martial jurisdiction to civilians accompanying the armed forces overseas, including dependents, is warranted by both practical considerations and constitutional doctrine. It is not an attempt to gain power for the military at the expense of American civilian law. It is, rather, a recognition of the realities of present day American military commitments and the requirements of our national security in areas where American civilian law is not the governing law. It postulates that at the present time not only weapons of war, but the whole area of defense and the whole system of military arrangements, are very different from those that existed before 1916. In today's circumstances, civilians accompanying the armed forces overseas, including dependents, are an intimate part of the American military contingent abroad. Just as it was a reasonable regulation of the armed forces in 1776 to provide for court-martial jurisdiction over civilians dealing with the armed forces in

States. The suggestion that cases involving foreign civilians as victims could be tried by court-martial overseas would hardly help this appellee. There is no constitutional basis for suggesting that the scope of the power to provide for trial by courts-martial could thus be made to turn on the nationality of the victim.

the United States, it is reasonable now to provide for military control of Americans accompanying the armed forces abroad. The Constitution is broad enough to encompass these changed circumstances and to sanction the means Congress has chosen for dealing with them. Apart from our additional and alternative argument below (*infra*, pp. 48-65), the war power, the power to govern the land and naval forces, and the "Necessary and Proper" Clause are sufficient in themselves to sustain Article 2 (11).

B. ARTICLE 2 (11) IS A VALID EXERCISE OF THE POWER OF CONGRESS TO MAKE ALL LAWS NECESSARY AND PROPER FOR CARRYING INTO EXECUTION THE SOVEREIGN POWER OF THE UNITED STATES TO MAINTAIN RELATIONS WITH OTHER SOVEREIGNTIES

Article 2 (11) may also be sustained as an appropriate exercise by Congress of its power to enact legislation necessary and proper for carrying into execution those international agreements and treaties negotiated by the President whereby components of the United States armed forces stationed in friendly foreign nations are secured the right to try all persons serving with, employed by, or accompanying those forces for offenses committed by them in such foreign lands for which they would otherwise be subject to trial in the courts of the country where they are stationed.²⁶—This approach to Article 2 (11) anal-

²⁶ Another pertinent source of power is that of Congress to implement the President's authority as Commander-in-Chief of our armed forces.

ogizes court-martial jurisdiction over offenses committed outside the United States to similar jurisdiction conferred upon and exercised through much of our history by United States consular courts and similar tribunals (*Dainese v. Hale*, 91 U. S. 13; *In re Ross*, 140 U. S. 453).

1. Article 2 (11) is an aid to and implementation of the conduct of foreign relations

(a). It is a recognized principle of international law that the jurisdiction of a nation *within its own territory* is generally absolute. *Schooner Exchange v. McFaddon*, 7 Cranch 116, 134. No foreign power can of right institute or erect any court of any kind within the limits of another nation except such as may be warranted by or in pursuance of a treaty or agreement or recognized principles of international law. *Glass v. The Betsy*, 3 Dall. 6, 16.²⁷ As a corollary to these principles, there has developed the rule that the character of an act (relating to private parties) as lawful or unlawful is normally determined by the law of the country where the act is done. *Slater v. Mexican National R. R. Co.*, 194 U. S. 120, 126. Accordingly, the country in which a civilian accompanying American forces commits the crime of homicide might well insist on trying him in its own tribunals according to its own law.

²⁷ In this case the attempt of France to exercise admiralty jurisdiction in the United States by the Consuls of France without the warrant of a treaty was held to be without right.

American Banana Co. v. United Fruit Co., 213 U. S. 347, 356; *Phillips v. Eyre*, L. R. 4 Q. B. (1869) 225; L. R. 6 Q. B. (1870) 1, 28; see Schwartz, *International Law and the NATO Status of Forces Agreement*, (1953) 53 Col. L. Rev. 1091, 1104-1111; Re, *The NATO Status of Forces Agreement and International Law*, (1955) 50 Northwestern Law Rev. 349, 362-383. The foreign nation may, however, by international agreement, express or implied, or pursuant to accepted rules of international law, consent to the exercise of jurisdiction over American nationals by duly constituted United States authorities for acts done within the territory of the foreign nation. *Dainese v. Hale*, *supra*; *In re Ross*, *supra*.

Article 2 (11) may be supported as a recognition and implementation of these settled principles. Civilians accompanying the armed forces overseas would not normally be subject to United States law for local crimes committed overseas, without the consent of the sovereignty in whose territory the crimes are committed. It would not be reasonable to expect a foreign nation to accede to American requests for the right to try such persons under American law unless there were some system by which they could be tried. Manifestly it would hardly be feasible, or generally acceptable to other governments, for the United States to set up in all foreign countries in which its military forces are stationed its own separate civilian courts comparable in all respects

to federal district courts. As for the possibility of providing jurisdiction to the federal district courts to try overseas offenders in the United States, there are many obvious and serious difficulties, even if the foreign governments would be willing to have such cases tried so far from the scene of the crime. For uniformed members of our armed forces overseas, there is already in existence a regulated body of law and procedure which unquestionably can be used as the method of trying them for offenses committed within the territory of a foreign sovereign. For civilian persons accompanying the armed forces overseas, the question becomes whether it is also reasonable to use the existing system of courts-martial as the method for trying them under American law for offenses for which they would, in the absence of international agreement, normally be subject to trial under foreign law in the country where the crime occurred. Article 2 (11), in this aspect, is a description of the class of American civilians abroad over whom the United States could reasonably request a foreign country to relinquish its right to exercise jurisdiction, and is also a method of implementing the jurisdiction which the foreign country has agreed to permit us to exercise within its territory.

In this light, the phrase "accompanying the armed forces" as applied to civilians overseas is governed by entirely different considerations

from those that would apply to construction of the same phrase had Congress attempted to apply it in peacetime to civilians accompanying the armed forces within the United States. In the United States, the phrase in relation to court-martial jurisdiction would mark the dividing line between military trial and a trial by an Article III constitutional court. With respect to local crimes committed by American citizens abroad, however, the foreign land has a significant interest, and Article III judicial power and the provisions for trial by the jury do not apply. *In re Ross*, 140 U. S. 453; see *infra*, pp. 61-65.

"Accompanying the armed forces" in relation to civilians abroad thus marks, not the dividing line between United States civil and military jurisdiction, but the boundary between foreign and United States jurisdiction. It defines the group for whose conduct in foreign countries the United States is prepared to accept responsibility and to provide punishment under American law. Considering that, as shown above, persons accompanying the armed forces bear an intimate relationship to the armed forces and that their conduct does have a direct effect on the prestige and relations of the United States abroad, we think there can be little question of the power of Congress to include them in the group which it desires to be subject to American law overseas, if the right to exercise jurisdiction over them can be obtained from the foreign country.

where they commit crime. And in view of that intimate connection with the armed forces and of the large measure of due process which our system of courts-martial provides (see *Burns v. Wilson*, 346 U. S. 137, 142-143), we think Congress was clearly empowered to use, as the method of trying this group under United States law, the existing system of courts-martial. That choice invades no rights of the accused under the Constitution, and affords him a fair trial under an established system of justice.

(b). The importance and direct relationship of Article 2 (11) to the conduct of foreign relations is illustrated by the treaties between ^{the} United States and Great Britain as they affect this immediate case.

The United States, unwilling to have American armed forces stationed in the United Kingdom during World War II subject to the jurisdiction of British civil courts, negotiated an agreement in an exchange of notes in 1942 whereby England undertook:

* * * subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces, * * *. [Appendix, *infra*, p. 78.]

In the English note (*Appendix infra*, pp. 78-83), Sir Anthony Eden, then Foreign Minister, after noting that the arrangement involved a "considerable departure * * * from the traditional system and practice of the United Kingdom", pointed out that the readiness of His Majesty's Government to make the agreement was "based upon the assumption that the United States service authorities and courts concerned will be able and willing to try and, on conviction, to punish all criminal offences which members of the United States Forces may be alleged on sufficient evidence to have committed in the United Kingdom."²⁸

²⁸ While England did not wish to make the arrangements in regard to American jurisdiction in England dependent upon a formal grant of reciprocity by the United States in regard to English troops stationed in this country, the Foreign Minister pointed out that, since the same considerations are equally applicable in both countries, His Majesty's Government would find it very agreeable if the United States would accord the same jurisdiction to English service courts in this country.

Congress, acting in accord with the spirit of the agreement with England, passed the Service Courts of Friendly Foreign Forces Act, 1944 (58 Stat. 643; 22 U. S. C. 701-706), to implement the court-martial jurisdiction of the military components of friendly nations within the territorial limits of the United States. By its terms, this Act was to be operative only upon a Presidential finding that its "powers and privileges" were necessary. By Presidential Proclamation No. 2626 of October 12, 1944, the provisions of the Act were made applicable to United Kingdom and Canadian forces stationed in the United States. 9 Fed. Reg. 12403 (1944). Although this Act was designed to reciprocate for the immunity granted American forces in England by the Visiting Forces Act of

Following the acceptance of the English proposals by the United States Ambassador in a note of July 27, 1942 (Appendix, *infra*, pp. 83-84), Parliament ratified the agreement by passage of The United States of America (Visiting Forces) Act of 1942 (5 & 6 Geo. 6, c. 31; Appendix, *infra*, pp. 74-78). After reciting in the preamble that the purpose of the Visiting Forces Act was "to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America, relating to jurisdiction over members of the military and naval forces of the United States of America," it provided, in Section 1 (1), for the withdrawal of jurisdiction from the English civil courts over members of the United States Forces. Section 2 (1) declared that its provisions shall apply to "all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country". The Act further provided in Section 2 that the immunity from English prosecution secured to Americans under the agreement would be evi-

1942, it did not grant to the service courts of visiting forces exclusive jurisdiction. It merely recognized and implemented the concurrent jurisdiction of the visiting forces service courts by making it lawful for American arresting officers to surrender custody of foreign forces personnel to their respective commanders for trial by service courts within the United States. Nor did the Act define with precision who should be subject to its terms, but simply provided, in the pattern of the Visiting Forces Act, that it applied to "any member of such force".

denced by a certificate issued by American authorities stating that the person to whom it applied was "subject to the military or naval law of the United States of America" and that the certificate would be "conclusive evidence of that fact" binding on the English authorities. As to appellee, the government of the United Kingdom accepted the certificate, required by the Visiting Forces Act; that appellee came within the provisions of the Uniform Code of Military Justice, and "handed over jurisdiction to the United States military forces" (R. 131).

This illustrates, in actual practice, the significance of Article 2 (11) in international relations. The United Kingdom was willing to regard a person as intimately related to visiting American forces as appellee as subject to United States jurisdiction, but only on the condition and with the understanding that the United States was able and willing to try her. The international agreement by which the United States obtained the right to exercise jurisdiction to try its own national under its own law was both possible and effective because Congress had established a method by which such agreement could operate.

Article 2 (11), in relation to civilians abroad, is an instrument of the conduct of our relations with the countries where our troops are stationed. Congress recognized it as such. The opening clause of Article 2 (11) furnishes internal evidence that its provisions are to be

weighed and read in the light of American foreign affairs. It provides that court-martial jurisdiction over "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States" and certain territories shall be "[s]ubject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law" (*supra*, p. 3). Congress thus disclosed its intent that this phase of court-martial jurisdiction should be construed in the light of treaties and international law and agreements.

(c). The legislative history of Article 2 (11) further demonstrates that Congress intended to correlate the jurisdiction of courts-martial convened on foreign soil with the rights acquired by the United States under treaty arrangements or possessed by virtue of accepted rules of international law. H. R. 4080, as introduced in the House of Representatives and referred to the Committee on Armed Forces, provided in proposed Article 2 (11) that among those subject to the Code would be:

All persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and the following Territories: * * *

The Committee, in apparent recognition of the impact of proposed Article 2 (11) on foreign affairs, recommended in its report (H. Rep. No.

491, 81st Cong., 1st Sess.) that it be amended to avoid the possibility of international misunderstanding. It stated, at page 9:

In addition to the committee amendments to H. R. 2498 which appear as original provisions in H. R. 4080, two substantive amendments to H. R. 4080 which are worthy of comment have been adopted by the committee. * * * The second amendment pertains to article 2, page 5, subdivision 11, beginning on line 18, and subdivision 12, beginning on line 24. You will note that subdivision 11 confers jurisdiction over all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and certain territories. Subdivision 12 confers jurisdiction over all persons within an area leased by the United States which is under the control of the Secretary of the Department and which is without the United States and certain Territories. It has been discovered that the United States armed forces occupy certain territory in the Philippines, which territory was originally acquired for the use of the United States by virtue of the 1898 Treaty with Spain, which territory continues to be used by our armed forces by virtue of the military base agreement of 1947 between the United States and the Philippines. We find that under the provisions of subdivision 12, we will have no jurisdiction over persons not

otherwise subject to this code who enter this property and commit offenses while on the property. It is considered desirable to have such jurisdiction. *On the other hand we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements. Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement. In order that our intent be made perfectly clear, the following amendment was adopted: On page 5, line 18, at the beginning of subdivision (11) insert "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law", and substitute a small a for the capital A in "All". [Emphasis added.]*

H. R. 4080 passed the House with this amendment and was referred in the Senate to the Committee on Armed Forces. In its report (S. Rep. No. 486, 81st Cong., 1st Sess.), the Senate Committee pointed out that the jurisdiction conferred on courts-martial under Article 2 (11) will be controlled by treaties and accepted rules of inter-

national law. It stated, at pages 7 and 8 of the report, that:

Paragraphs (11) and (12) are adapted from 34 U. S. C., section 1201, but are applicable in time of peace as well as war. Both paragraphs, however, have been made subject to the provisions of any treaty or agreement to which the United States is a party or to an accepted rule of international law. Paragraph (11) is somewhat broader in scope than AW 2 (d) in that the code is made applicable to persons employed by or accompanying the armed forces as well as those serving with or accompanying the armed forces, and the territorial limitations during peacetime have been reduced to include territories where a civil court system is not readily available.

The Senate accepted this amendment to Article 2 (11).

Thus, Congress, in conferring jurisdiction on courts-martial over "all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States", recognized its implications in foreign affairs and sought to prevent embarrassment in international relations by providing that this jurisdiction shall be exercised in accordance with the provisions of treaties or agreements to which the United States is or may be a party or pursuant to accepted rules of international law. Congress was explicitly meshing its enactment

with the rights and interests of the country where the crime was committed, but at the same time it was providing an American forum which could apply American law under an established system of justice.

2: *For the exercise of extraterritorial jurisdiction like that governed by Article 2 (11), Congress was not required to provide for indictment and jury trial in Article III courts, but could authorize trial by court-martial with the guaranties of due process such trial affords*

Once it is recognized that the power conferred by Article 2 (11) is an extraterritorial jurisdiction inextricably involved with the field of international relations, the Article finds clear support in precedent, even apart from the military justification discussed earlier (*supra*, pp. 31-48). Closely in point are *In re Ross*, 140 U. S. 453, the controlling principles there applied, and the substantial legal history sanctioning those principles. See also *Dorr v. United States*, 195 U. S. 138 (fn. 30, *infra*, p. 63); *Neely v. Henkel*, 180 U. S. 109 (*infra*, pp. 63, 64); *Ex parte Bakelite Corp.*, 279 U. S. 438 (fns. 29, 30; *infra*, pp. 62-63).

The *Ross* case involved the trial and conviction by a consular court in Japan of a seaman on an American vessel for the murder of his mate aboard the ship in the harbor of Yokohama. Upholding the conviction and a life sentence thereunder, this Court rejected the contention that the provisions for such consular courts were

invalid for failure to afford the procedures of indictment and jury trial. Discussing the ancient lineage of such tribunals (p. 462), the Court held that in creating this kind of extra-territorial jurisdiction Congress was not required to follow the provisions of Article III and the Sixth Amendment providing for indictment and trial by jury within the United States (pp. 463-465). The Court pointed out (p. 464) that when "the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other." And the Court noted the compensating advantage of trial by an American rather than a foreign tribunal (p. 465)—a factor which is considered by many to remain a substantial benefit today. Cf. *Keefe v. Dulles*, 222 F. 2d 390 (C. A. D. C.), certiorari denied, 348 U. S. 952.²⁹

The constitutional principles sustaining trial for murder in a consular court—with substantially less clear and particular safeguards for the rights of the accused before trial, during trial, and as to appeal than those supplied by the

²⁹ For the extensive history and practice of American consular courts and similar extraterritorial tribunals, see (in addition to *In re Ross*) 2 Moore, *Digest of International Law* (1906), secs. 262-290; 2 Hackworth, *Digest of International Law* (1941), secs. 177-190; Note, *The United States Court for China*, (1936) 49 Harv. L. Rev. 793; *Ex parte Bakelite Corp.*, 279 U. S. 438, 451.

Uniform Code of Military Justice—would seem *a fortiori* to sustain Article 2 (11). Persons like the appellee subject to this Article are, as we have observed, so closely identified with the military forces that military jurisdiction over them could well be sustained under the war power and the power to govern the armed forces (see pp. 31–48, *supra*); it is surely reasonable—for this extraterritorial area where Article III courts have never been required and where tribunals comparable to courts-martial have been in existence for well over a century (7 Op. Atty. Gen. 495)³⁰—to exercise American control overseas through this existing and carefully regulated system of tribunals.

Again, we note the relevance of *Madsen v. Kinsella*, 343 U. S. 341, and also of *Neely v. Henkel*, 180 U. S. 109. Both cases involved trials of American civilians in occupied territory—in *Madsen*, by an American occupation tribunal applying German law, in *Neely*, by a Cuban court constituted under American occupation authority. In *Madsen*, where this Court stated that trial by court-martial would also have been proper

³⁰ The constitutional provisions for jury trial and for indictment by grand jury have also been held not to apply to unincorporated territories and possessions of the United States. *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, 195 U. S. 138; *Ocampo v. United States*, 234 U. S. 91; *Balzac v. Porto Rico*, 258 U. S. 298. The judges of the courts in such places need not be given life tenure. *Ex parte Bakelite Corp.*, 279 U. S. 438, 449, 451.

(*supra*, pp. 41-42), the court which was held to have jurisdiction over the defendant was established by executive authority rather than by statute. In both cases, there was neither indictment nor jury trial.

To be sure, those cases involved occupation rather than military bases established by consent on the soil of a friendly foreign power. We believe, nevertheless, that the underlying principles relating to the war power and the power over international affairs are of persuasive significance here. Read with the *Ross* case, these decisions show the wide scope of the power to exercise extraterritorial jurisdiction through tribunals other than those established under Article III. They show that, at least where basic guaranties of due process are met (a matter far more certain here than it was in *Neely v. Henkel*), an American accused of crime in a foreign land has no right to insist upon indictment and jury trial even though he is to be tried either by an American tribunal or under American auspices. Indeed, it might be urged that there was more reason in *Madsen* and *Neely* to require trial by an Article III court, for the United States, as occupying power, was in a position to impose its will on the occupied country and could therefore have insisted on having the trial in a federal district court in this country. In this case, on the other hand, the United States must deal with an equal foreign sovereign which has a proper

interest and claim to a trial within its own borders and could probably insist, in almost all cases, on trying the accused in its own courts under its own law. See *supra*, pp. 49-51.

The appellee, for an alleged offense in England, is to be tried by a court of a type to which millions of Americans are and have been subject even for offenses within the United States. There is every reason to believe that the trial and appellate procedures, which have already resulted in reversal of her conviction with leave to retry her, will be fair ones. In the circumstances, the Constitution requires no more.

III

JURISDICTION OVER APPELLEE UNDER ARTICLE 2 (11) WAS NOT LOST BY REASON OF HER TRANSPORTATION TO THE UNITED STATES, HER IMPRISONMENT IN THE FEDERAL REFORMATORY FOR WOMEN, OR THE REVERSAL OF HER CONVICTION BY THE COURT OF MILITARY APPEALS

The appellee also contends (Motion to Dismiss or Affirm, pp. 12-14) that, assuming the validity of Article 2 (11), jurisdiction over her under that Article was lost because she was returned in custody to the United States; where her conviction was reversed and a rehearing authorized. If it were sound, this argument would mean that persons tried under Article 2 (11) must be kept overseas during trial, appeal, retrial, and perhaps during any ensuing period of imprisonment, in order to prevent a loss of military juris-

diction. This odd requirement could, of course, be met in another case if there were any reason for it. But there is no constitutional or statutory justification for its imposition.

The court-martial jurisdiction asserted over appellee by virtue of the proceedings commenced in England, will, under established principles of law, continue until a final disposition of the case. *Barrett v. Hopkins*, 7 Fed. 312, 315 (C. C. D. Kan.). The rule is recognized that court-martial jurisdiction which has attached to a serviceman is not defeated by the expiration of his enlistment before the conclusion of the proceedings. *In re Bird*, Fed. Case No. 1,428 (D. Ore.). This general rule is dictated by imperative considerations of public policy and is grounded on sound reason. To hold that a soldier, on the eve of his discharge, can, with impunity, commit any of the myriad of military offenses so disruptive of essential discipline and, on the morrow, escape all punishment would greatly demoralize the military service. Military jurisdiction in such cases must be maintained until such time as the service, by an unequivocal act, demonstrates its intent to relinquish its jurisdiction. In this case, the original jurisdiction asserted over appellee has continued. The action of the Court of Military Appeals in setting aside the conviction of appellee and ordering a rehearing (R. 110) did not divest the Air Force of jurisdiction over her under Article 2 (11). Since the Court of Mili-

tary Appeals did not rule that the service court was without jurisdiction to try her, there is no ground for constraining the order for the new proceeding at Bolling Air Force Base (R. 122) as an original assertion of military jurisdiction over her. The court ordered a rehearing which is merely a continuation of the original proceedings.

A rehearing may be ordered by the Court of Military Appeals when it sets aside the findings and sentence as approved by the convening authority and as affirmed or set aside as incorrect in law by the Board of Review (Article 67 (d), (e), 50 U. S. C. 654 (d), (e)). The nature and function of a rehearing is specifically defined in Article 63 (50 U. S. C. 650), which provides:

(a) If the convening authority disapproves the findings and sentence of a court-martial he may, except where there is lack of sufficient evidence in the record to support the findings, order a rehearing, in which case he shall state the reasons for disapproval. If he disapproves the findings and sentence and does not order a rehearing, he shall dismiss the charges.

(b) Every rehearing shall take place before a court-martial composed of members not members of the court-martial which first heard the case. Upon such rehearing the accused shall not be tried for any offense of which he was found not guilty by the first court-martial, and no sentence in excess of or more severe than the original sentence shall be imposed un-

less the sentence is based upon a finding of guilty of an offense not considered upon the merits in the original proceedings or unless the sentence prescribed for the offense is mandatory.

The legislative history of Article 63 clearly shows that Congress understood that "a rehearing is a continuation of the former proceeding."³¹ The military courts which have had occasion to consider the nature of a rehearing have followed this declaration of legislative purpose and repeated the phrase that it is but a continuation of the original proceeding. *United States v. Padilla*, 5 CMR 31, 42; *United States v. Moore*, 5 CMR 438, 444; *United States v. Milbourne*, 15 CMR 527, 528.³²

The jurisdiction properly asserted over appellee by the original court-martial was not defeated by reason of her return to the United States in Air Force custody or her confinement in the Federal reformatory under court-martial sentence. Such return and confinement did not

³¹ H. Rep. No. 491, 81st Cong. 1st Sess., p. 30; S. Rep. No. 486, 81st Cong. 1st Sess., p. 27.

³² Col. Frederick Bernays Wiener, in testifying before a Subcommittee of the Committee on Armed Forces of the House of Representatives on HR 2498, which became the Uniform Code of Military Justice, pointed out that a rehearing of the charge against an accused does not, in military law where appeals are automatic, constitute a second jeopardy. Hearings before a Subcommittee of the Committee on Armed Services on H. R. 2498, House of Representatives, 81st Cong., 1st Sess., p. 803.

operate as a waiver or surrender of military jurisdiction over appellee. Article 58 of the Uniform Code of Military Justice (50 U. S. C. 639) provides in part:

* * * any sentence of confinement adjudged by a court-martial or other military tribunal * * * may be carried into execution by confinement in any place of confinement under the control of any of the armed forces, or in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use * * *.

And Section 4083, Title 18 U. S. C., states in part:

Persons convicted of offenses against the United States or by courts-martial and sentenced to terms of imprisonment of more than one year may be confined in any United States penitentiary.

The convening authority conformed to Article 58 and Section 4083 when, on approving the sentence of the court-martial, he designated the Federal Reformatory for Women at Alderson as the place of confinement pending appellate review (R. 2).

Thus, the return of appellee to the United States in Air Force custody and her subsequent confinement in the Federal reformatory on orders of military authority demonstrate that the Air Force was maintaining and asserting jurisdiction over her and rebut any inference that it intended, by returning her to this country, to surrender its

jurisdiction. Cf. *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904. Her return and confinement were in execution of the sentence imposed by the court-martial; they followed from and were based on the jurisdiction over her under Article 2 (11) as a person "accompanying the armed forces." To say that her return and confinement in the United States defeated military jurisdiction over her would result in the anomalous situation of having a valid exercise of jurisdiction under Article 2 (11) defeated by execution of a sentence imposed in accordance with Article 58.

Even when a soldier has been discharged he is deemed in military custody while he is serving his military sentence.³³ *Carter v. McClaughry*, 183 U. S. 365; *Kahn v. Anderson*, 255 U. S. 1, 7. In *Carter v. McClaughry* the Court stated (p. 383):

The accused was proceeded against as an officer of the Army, and jurisdiction attached in respect of him as such, which included not only the power to hear and

³³ Article 2 (7) of the Uniform Code of Military Justice limits the jurisdiction of the armed forces over military prisoners confined in non-military prisons for offenses committed therein, but it does not alter the principle set forth in the cases in the text that a change in status of an accused does not divest the military service of jurisdiction over him once it has properly attached.

The provisions of Article 2 (7) have no application in this case to appeal as she will be tried at the rehearing on the original charges and not for an offense committed while she was confined in the Federal reformatory pending the completion of the appellate review of her case.

determine the case, but the power to execute and enforce the sentence of the law. Having been sentenced, his status was that of a military prisoner held by the authority of the United States as an offender against its laws.

Since the change of status of Carter from soldier to military prisoner did not deprive the Army of jurisdiction to try him as long as he remained in Army custody, no reason appears why appellee's return to this country in Air Force custody and her confinement under Air Force orders should defeat the right of the Air Force to re-try her under the same jurisdiction it originally asserted in England. Appellee's status as a military prisoner alone suffices to preserve military jurisdiction. The Court in *Kahn v. Anderson*, *supra*, pp. 7-8, cited with approval in *Toth v. Quarles*, 350 U. S. 11, stressed the importance of custody to jurisdiction when it wrote:

* * * we are of opinion that, even if their discharge as soldiers had resulted from the previous sentences which they were serving, it would be here immaterial, since, *as they remained military prisoners, they were for that reason subject to military law and trial by court-martial for offenses committed during such imprisonment.* [Emphasis added.]

There is therefore nothing anomalous in the happenstance that appellee's retrial has been or-

dered to be held in Bolling Air Force Base rather than in England.

The decision of the Court in *Toth v. Quarles*, 350 U. S. 11, is entirely consistent with the proposition that the return of appellee to the United States in Air Force custody and her confinement at Alderson under a court-martial sentence does not destroy the jurisdiction of the Air Force to conduct a rehearing. In the *Toth* case the Air Force had unequivocally demonstrated its intent to relinquish all jurisdiction over the accused by granting him an honorable discharge. The Air Force, on the other hand, has never demonstrated an intent to surrender its jurisdiction over appellee. By returning her to the United States in custody, by confining her under court-martial sentence, by transferring her to Washington, D. C., it patently demonstrated its intent and purpose to continue to assert jurisdiction over her. Thus, the *Toth* case is distinguishable from this on both its facts and its underlying principle.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be reversed.

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Solicitor General.

WARREN OLNEY III,
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APRIL 1956.

UNITED STATES OF AMERICA.
(VISITING FORCES) ACT, 1942.

(5 & 6 Geo. 6.)

CHAPTER 31

An Act to give effect to an agreement recorded in Notes exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America, relating to jurisdiction over members of the military and naval forces of the United States of America. [6th August 1942.]

Whereas His Majesty, in exercise of the powers conferred on Him by subsection (3) of section one of the Allied Forces Act, 1940, and of all other powers enabling Him in that behalf, has been pleased, by Order in Council, to make provision defining the relationship of the authorities and courts of the United Kingdom to the military and naval forces of the United States of America who are or may hereafter be present in the United Kingdom or on board any of His Majesty's ships or aircraft, and facilitating the exercise in the United Kingdom or on board any such ship or aircraft of the jurisdiction conferred on the service courts and authorities of the United States of American by the law of that country:

And whereas the Notes relating to jurisdiction over members of the said forces set out in the

Schedule to this Act have been exchanged between His Majesty's Government in the United Kingdom and the Government of the United States of America:

And whereas it is expedient to give effect to the agreement recorded by the said Notes:

Now, therefore, be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:

1.—(1) Subject as hereinafter provided, no criminal proceedings shall be prosecuted in the United Kingdom before any court of the United Kingdom against a member of the military or naval forces of the United States of America:

Provided that upon representations made to him on behalf of the Government of the United States of America with respect to any particular case, a Secretary of State may by order direct that the provisions of this subsection shall not apply in that case.

(2) The foregoing subsection shall not affect any powers of arrest, search, entry, or custody, exercisable under British law with respect to offences committed or believed to have been committed against that law, but where a person against whom proceedings cannot, by virtue of that subsection, be prosecuted before a court of the United Kingdom is in the custody of any authority of the United Kingdom, he shall, in accordance with such general or special directions as may be given by or under the authority of a Secretary of State, the Admiralty, or the Minister for Home Affairs in Northern Ireland, for the

purpose of giving effect to any arrangements made by His Majesty's Government in the United Kingdom with the Government of the United States of America, be delivered into the custody of such authority of the United States of America as may be provided by the directions, being an authority appearing to the Secretary of State, the Admiralty, or the Minister, as the case may be, to be appropriate having regard to the provisions of any Order in Council for the time being in force under the Act hereinbefore recited and of any orders made thereunder.

(3) Nothing in this Act shall render any person subject to any liability whether civil or criminal in respect of anything done by him to any member of the said forces in good faith and without knowledge that he was a member of those forces.

2.—(1) For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces:

Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom.

(2) For the purposes of any proceedings in any court of the United Kingdom, a certificate issued by or on behalf of such authority as may

be appointed for the purpose by the Government of the United States of America stating that a person of the name and description specified in the certificate is, or was at a time so specified, subject to the military or naval law of the United States of America, shall be conclusive evidence of that fact.

(3) For the purposes of any proceedings in any court of the United Kingdom in which the question is raised whether a party to the proceedings is, or was at any time, a member of the military or naval forces of the United States of America, any such certificate as aforesaid relating to a person bearing the name in which that party is charged or appears in the proceedings shall, unless the contrary is proved, be deemed to relate to that party.

(4) Any document purporting to be a certificate issued for the purposes of this section, and to be signed by or on behalf of an authority described as appointed by the Government of the United States of America for the purposes of this section, shall be received in evidence, and shall, unless the contrary is proved, be deemed to be a certificate issued by or on behalf of an authority so appointed.

3.—(1) His Majesty may by Order in Council direct that the foregoing provisions of this Act shall, subject to such adaptations and modifications as may be specified in the Order, have effect in any colony or in any British protectorate or in any territory in respect of which a mandate on behalf of the League of Nations is being exercised by His Majesty's Government in the United King-

dom, in like manner as they have effect in the United Kingdom.

(2) An Order in Council under this section may be revoked or varied by a subsequent Order in Council.

4. This Act may be cited as the United States of America (Visiting Forces) Act, 1942.

UNITED STATES OF AMERICA

(VISITING FORCES) ACT, 1942

(5 & 6 Geo. 6)

SCHEDULE

NOTES EXCHANGED BETWEEN HIS MAJESTY'S GOVERNMENT IN THE UNITED KINGDOM AND THE GOVERNMENT OF THE UNITED STATES OF AMERICA

No. W. 10338/13/64

FOREIGN OFFICE, S. W. 1.

27th July, 1942.

YOUR EXCELLENCY, Following the discussions which have taken place between representatives of our two Governments, His Majesty's Government in the United Kingdom are prepared, subject to the necessary Parliamentary authority, to give effect to the desire of the Government of the United States that the Service courts and authorities of the United States Forces should, during the continuance of the conflict against our common enemies, exercise exclusive jurisdiction in respect of criminal offences which may be committed in the United Kingdom by members of those Forces, and they are ready to introduce in

Parliament the necessary legislation for this purpose.

2. It is appreciated, however, that cases may arise where for particular reasons the American authorities may prefer that their courts should not exercise the above jurisdiction, and His Majesty's Government would accordingly propose that in any case in which a written communication to that effect is received from the Diplomatic Representative of the United States it should be open to the appropriate British authority to restore the jurisdiction of the courts of the United Kingdom to deal with that case.

3. In view of the very considerable departure which the above arrangements will involve from the traditional system and practice of the United Kingdom there are certain points upon which His Majesty's Government consider it indispensable first to reach an understanding with the United States Government. I have accordingly the honour to invite Your Excellency to be so good as to lay the following enquiries and observations before your Government and to inform me of their attitude thereupon.

4. In the first place, the readiness of His Majesty's Government in the United Kingdom to agree to the exercise by United States Service courts of exclusive jurisdiction in respect of offences by members of their Forces is based upon the assumption that the United States Service authorities and courts concerned will be able and willing to try and, on conviction, to punish all criminal offences which members of the United States Forces may be alleged on sufficient evidence to have committed in the United Kingdom,

and that the United States authorities are agreeable in principle to investigate and deal with appropriately any alleged criminal offences committed by members of the United States Forces in the United Kingdom which may be brought to their notice by the competent British authorities, or which the American authorities may find to have taken place.

5. Secondly, His Majesty's Government will be glad if Your Excellency will confirm their understanding that the trial of any member of the United States Forces for an offence against a member of the civilian population would be in open Court (except where security considerations forbade this) and would be arranged to take place promptly in the United Kingdom and within a reasonable distance from the spot where the offence was alleged to have been committed, so that witnesses should not be required to travel great distances to attend the hearing.

6. Thirdly, His Majesty's Government propose that no member of the United States Forces should be tried in the United Kingdom by a Service Court of the United States of America, for an offence committed by him before 7th December, 1941.

7. Fourthly, while His Majesty's Government in the United Kingdom would not wish to make the arrangements in regard to jurisdiction over members of the United States Forces in this country dependent upon a formal grant of reciprocity in respect of United Kingdom Forces in the territory of the United States of America, I feel that Your Excellency will appreciate that the considerations which have convinced His Majesty's

Government in the United Kingdom that the interests of our common cause would be best served by the arrangements which they are prepared to make as regards jurisdiction over American forces in the United Kingdom would be equally applicable in the case of British forces which in the course of the war against our common enemies may be stationed in territory under American jurisdiction. It would accordingly be very agreeable to His Majesty's Government in the United Kingdom if Your Excellency were authorized to inform me that in that case the Government of the United States of America will be ready to take all steps in their power to ensure to the British forces concerned a position corresponding to that of American forces in the United Kingdom under the arrangements which His Majesty's Government are willing to make. The considerations indicated in paragraph 2 above would naturally apply and His Majesty's Government would be prepared to authorise the Diplomatic Representative of His Majesty in the United States to notify the competent American authorities in cases where the appropriate British authorities preferred not to exercise jurisdiction.

8. Fifthly, the proposal to ensure to the United States Service Courts and authorities by legislation the exclusive exercise of jurisdiction in respect of criminal offences by members of the United States Forces in the United Kingdom is based upon the further assumption that satisfactory machinery will be devised between the competent American and British authorities for such mutual assistance as may be required in making investigations and collecting evidence in

respect of offences which members of the United States Forces are alleged to have committed, or in which they are alleged to be concerned. His Majesty's Government have no doubt that the United States Government will agree that it would as a general rule be desirable that such preliminary action should be taken by the British authorities, on behalf of the American authorities, where the witnesses or other persons from whom it is desired to take statements are not members of the United States Forces. Conversely, His Majesty's Government trust that they may count upon the assistance of the American authorities in connexion with the prosecution before British courts of persons who are not members of the United States Forces where the evidence of any member of these Forces is required or where the assistance of the American authorities in the investigation of the case (including the taking of statements from the American forces) may be needed.

9. His Majesty's Government in the United Kingdom are prepared to extend the proposed legislation where necessary to British Colonies and Dependencies under their authority, other than those British territories in which are situated the United States Military and Naval Bases leased in pursuance of the Agreement of 27th March, 1941, where the question of jurisdiction is already regulated by that Agreement. I accordingly propose that the foregoing paragraphs of this note, and your eventual reply, should be regarded as extending also to the arrangements to be made in the British Colonies and Depend-

encies to which the proposed legislation may be applied.

10. Finally, His Majesty's Government propose that the foregoing arrangements should operate during the conduct of the conflict against our common enemies and until six months (or such other period as may be mutually agreed upon) after the final termination of such conflict and the restoration of a state of peace.

11. If the foregoing arrangements are acceptable to the United States Government, I have the honour to propose that the present note and Your Excellency's reply be regarded as constituting an agreement between the two Governments to which effect shall be given as from the date on which the legislation to which I have already referred takes effect.

I have the honour to be,

With the highest consideration,

Your Excellency's obedient servant,

ANTHONY EDEN.

His Excellency

The Honourable

JOHN G. WINANT.

EMBASSY OF THE

UNITED STATES OF AMERICA.

London, 27th July, 1942.

No. 1919

SIR, I have the honor to refer to your note of July 27, 1942, in which you inform me that His Majesty's Government in the United Kingdom is prepared, subject to the necessary Parliamentary authority, to give effect to the desire of the

Government of the United States that American authorities have exclusive jurisdiction in respect to criminal offences which may be committed in the United Kingdom by members of the American Forces. I now have the honor to inform you that my Government agrees to the several understandings which were raised in your note.

In order to avoid all doubt, I wish to point out that the Military and Naval authorities will assume the responsibility to try and on conviction to punish all offences which members of the American Forces may be alleged on sufficient evidence to have committed in the United Kingdom.

It is my understanding that the present exchange of notes is regarded as constituting an agreement between the two Governments to which effect shall be given as from the date on which the necessary Parliamentary authority takes effect.

Accept, Sir, the renewed assurance of my highest consideration.

JOHN G. WINANT.

The Right Honourable

ANTHONY EDEN, M. C., M. P.

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WILLIAM E. WILEY, Clerk

October Term, 1956

CLARENCE THOMAS, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA, JAIL, APPELLANT

CLARENCE B. COVENS

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

NINA KROGER, WARDEN OF THE FEDERAL RE-
FORMATION AND WORKS, APPELLEE, VERSUS
CLARENCE B. COVENS

WILLIAM E. WILEY

ON PETITION OF CLARENCE B. COVENS, APPELLANT, FOR
WRIT OF HABEAS CORPUS, AND FOR WRIT OF HABEAS CORPUS

VERSUS NINA KROGER, WARDEN OF THE FEDERAL RE-
FORMATION AND WORKS, APPELLEE

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In the Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

**CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, APPELLANT**

v.

CLARICE B. COVERT

***ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA***

No. 713

**NINA KINSELLA, WARDEN OF THE FEDERAL RE-
FORMATORY FOR WOMEN, ALDERSON, WEST VIR-
GINIA, PETITIONER**

v.

WALTER KRUEGER

***ON WRIT OF CERTIORARI TO THE UNITED STATES COURT
OF APPEALS FOR THE FOURTH CIRCUIT***

REPLY BRIEF FOR APPELLANT AND PETITIONER

INVALIDATION OF ARTICLE 2 (11) WOULD HAVE GRAVE CONSEQUENCES FOR DISCIPLINE AT OVERSEAS INSTALLATIONS, FOR MAINTENANCE OF SATISFACTORY RELATIONS WITH FOREIGN COUNTRIES RECEIVING OUR TROOPS, AND FOR CONTINUED SUCCESS OF OUR PRESENT POLICY OF SEEKING IN MANY CASES TO AFFORD AN AMERICAN RATHER THAN A FOREIGN TRIAL.

In an apparent effort to show that the ordinarily solemn conclusion that Congress violated the Constitution is of small moment in this case, the appellee¹ cites figures on Court of Military Appeals cases (Covert Br. 90-91) to suggest that Article 2 (11) has insignificant application—a device comparable to relying on figures from this Court to appraise the scope of federal criminal jurisdiction. She finds this provision unnecessary to the maintenance of discipline at military installations overseas (Covert Br. 88-89), rejects the policy judgment of Congress that American jurisdiction may frequently be preferable to foreign jurisdiction in cases to which Article 2 (11) applies (Covert Br. 106), and concludes, in any event, that it is an “imaginary” fear to suppose that foreign countries (though they have never done so) will be reluctant to subordinate their local jurisdiction and allow us to remove persons to the United States for trial in our district

¹ For simplicity, we shall usually refer to the “appellee” (in No. 701), but our arguments, unless otherwise indicated, are, of course, also applicable to No. 713.

courts for crimes committed on their soil (Covert Br. 104-105). These attempts to minimize the importance, necessity, and propriety of Article 2 (11) will not bear close scrutiny.

A. THE ACTUAL NUMBER OF TRIALS SHOWS THE SUBSTANTIAL IMPORTANCE OF THE PROBLEM.

Figures obtained from the Army alone show that in the six fiscal years from July 1, 1949, to June 30, 1955, a total of 2,280 civilians were tried by court-martial, or an average of just under 400 per year.² To be sure, as in the civilian courts, this total is made up to a considerable extent of trials for lesser offenses; only 126 of the cases included for the six years represent trials by general court-martial.³ But this fact—like the fur-

² Comparable figures were not available for the Navy and Air Force; but it is clear from the available facts that they are much smaller. Thus, the Navy reports a total of 80 civilians tried by court-martial in the period from May 31, 1951, effective date of the Uniform Code of Military Justice, to the close of 1955. Even apart from these and the Air Force figures, which are not centrally compiled, the Army statistics alone refute the appellee's attempted showing of insignificance.

³ By fiscal years and type of trial, the Army figures are as follows:

Fiscal year	Number of Civilians Tried by General Court- Martial	Number of Civilians Tried by Inferior Court- Martial	Total
1950	20	737	757
1951	26	251	277
1952	14	291	305
1953	29	284	313
1954	24	419	443
1955	13	172	185
	126	2,154	2,280

ther fact appellee notes (Covert Br. 91), that, including the two cases now before this Court, there are only six current cases of civilians ordered confined to federal penitentiaries upon conviction by courts-martial (others, of course, are confined for relatively short terms in military guard-houses)—scarcely serves to show that Article 2 (11) is inconsequential and lightly to be set aside. It reflects, instead, that although the statute reaches this Court in two highly extraordinary murder cases, it has its major impact in the deterrence and control of the less tragic infractions which could, cumulatively, effect serious impairments of military discipline and our foreign relations. We turn to these considerations so lightly dismissed by the appellee.

B. ARTICLE 2 (11) ATTEMPTS TO SOLVE DIFFICULT PROBLEMS OF DISCIPLINE AND INTERNATIONAL HARMONY

As the Court noted in *Toth v. Quarles*, 350 U. S. 11, 20-21, the Judge Advocate General strongly opposed as undesirable and constitutionally doubtful the extension, under Article 3 (a) of the Uniform Code, of court-martial jurisdiction to civilian ex-soldiers having "no relationship of any kind with the military" (*id.*, at 13). On the other hand, the Judge Advocate General actively sought forty years ago the provision which is now Article 2 (11) (see our main brief, pp. 34-37), and subsequent history has given increasingly

powerful testimony to the necessity and propriety of that effort.⁴ For the success of our military missions in the sixty-odd nations which have received our forces with their accompanying civilian contingents would be seriously impaired by invalidation of the military control authorized in Article 2 (11). Cf. *Toth v. Quarles*, *supra*, at 22.

1. Though Congress carefully limited the peacetime jurisdiction over accompanying civilians in Article 2 (11) to foreign areas, where there is no requirement of indictment and jury trial (*In re Ross*, 140 U. S. 453; see our main brief, pp. 61-65), the appellee finds the limitation constitutionally and practically pointless, arguing (Covert Br. 66-68) that the situation of such civilians in foreign countries is not different from that of civilians residing on military installations within the

⁴ In our main brief we observed (p. 45, fn. 23) that pre-1916 expressions of Judge Advocates General limiting court-martial power over civilians to wartime seemed clearly to deal only with civilians *within the United States*. The appellee states (Covert Br. 42) that, since the opinions she has invoked are only digests, our conclusion is not necessarily correct, and that inferences adverse to the Government in this case should be drawn from the fact that the full opinions were not published. We have examined the full opinions in the National Archives, where they are available to opposing counsel, and they confirm our statement. We had thought that American history, which records substantially no cases before this century of civilians accompanying the armed forces overseas in peacetime, supplied adequate confirmation.

United States or its territories. But there is a plain fallacy in this attempt to equate problems which are basically so disparate.

Together with their civilian contingents, our military units in foreign countries around the world constitute, in point of fact as well as in domestic and international law, close-knit American communities received and carefully regulated as wholes by international agreement. Our allies require and are given express assurances that *all* the members of such communities will be governed by effective American controls insuring against conduct offensive or injurious to the receiving state.⁵ Not less important, and wholly apart from the need for fulfilling such assurances, the safety, integrity, and effectiveness of those in uniform require military control of those garrisoned with them.

Elsewhere in this and our main brief we emphasize the role of Article 2 (11) in making possible an American rather than a foreign trial in the many cases where the choice has been deemed desirable and has been possible as a matter of international negotiation. But the problem is a complex one and affects also a variety of situations where the local law of the receiving state is either inapplicable or ineffective and where the

⁵ See, *e. g.*, Articles II, VII (5), (6), and XIII of the NATO Status of Forces Agreement, TIAS 2846, Appendix, *infra*, pp. 33-37-38, 41.

only practicable means of necessary control is found in the jurisdiction conferred by Article 2 (11). We cite only major areas of concern, not stopping in each case to see whether the jurisdiction of foreign courts could or should be invoked, to give some measure of the importance of Article 2 (11) to our military efforts overseas.

a. Health and welfare, ground safety, and morale are all concerns to which the jurisdiction under Article 2 (11) is important. Whether or not they wear uniforms, all those who are in fact part of our military communities abroad affect and are affected by measures governing immunization, sanitation, epidemic control, quarantines, and the like. To be effective, regulations declaring epidemic areas off-limits, or isolating diseased individuals, or imposing controls on certain on-post activities, must be enforceable by sanctions against civilians who accompany the forces voluntarily as well as against those in uniform who might have preferred to stay at home. Similarly, whether the offender be a colonel or a sergeant, the wife of one of them, or a civilian employee, the individual wielding a speeding car or an axe or a dagger, or stealing from a neighbor or colleague, is a threat which must be controllable or punishable on the scene. It clearly will not do to leave such actions wholly unpunished (and therefore undeterrable) or inadequately tried, possibly

after long delays, in a distant forum (see also *infra*, pp. 20-22).

In the face of contemporary realities, it is beside the point for appellee to condemn as unchivalrous (Covert Br. 63, 86) the trial by court-martial of "unarmed" women who would otherwise be triable in the courts of England or Japan for what they did or not be triable at all. Just as Mrs. Covert and Mrs. Smith chose to accompany the armed forces overseas, some 35,000 young women are voluntarily in uniform. Nobody doubts that these women (minimum age 18), like millions of American "strong men" (Covert Br.

⁶ The appellee (Covert Br. 88, 89-90, 103) points to the fact that other Americans overseas are not subject to American jurisdiction like that under Article 2 (11). But there are several plain answers to this observation. To begin with, such persons do not live in sharply marked communities, associated and identified with the military. Foreign countries do not expect, as they expressly do in the case of our military contingents and accompanying civilians (see pp. 10, 33, 37-38, 41, and fn. 12, *infra*), that such other persons will be admitted and controlled under close, unitary, and continuous control of the American authorities responsible for them. (Note, in this connection, the undertaking of receiving States under the Status of Forces Agreement to provide, where necessary, for the members of the sending State's force, civilian component, and dependents "medical and dental care, including hospitalisation, under the same conditions as comparable personnel of the receiving State." Article IX, par. 5, *infra*, p. 41.) Conversely, from our point of view, these other persons, because they do not live as members of integrated establishments, are not ordinarily in a position to affect by their individual actions the safety, morale, effectiveness, and acceptability of a unified operation like a military force.

110-112), are subject to court-martial jurisdiction both within and without the United States. Had a WAF or an Army nurse joined one of the defendants now before the Court as an accomplice, the propriety of her trial by court-martial would have been clear. The facts which have necessitated the nation's military posture today and the statutes which implement it are not necessarily happy ones. But they serve to dispel the suggestion that a general statute, in force for forty years and answering to vital national needs, should have its constitutionality determined by the sex of the particular defendants in the cases here now.

b. Because the possibility of war today is a threat of large-scale destruction commenced with lightning speed, our garrisons around the world must live on the alert. Like those in uniform, civilian employees and dependents are instructed and drilled on their responsibilities in the event of attack. Enforceable regulations are necessary to this end in peacetime, before the attack, if the safety and effectiveness of the fighting forces themselves are not to be endangered. Civilians employed by or accompanying our armed forces in compact military communities overseas are frequently in a position to violate essential security measures. The only safeguards likely to work as a matter of practical fact are military orders, backed by the threat of punishment under military law, for the civilians whose presence neces-

sarily gives rise to reciprocal responsibilities between them and the military mission of which they are part.

c. Because our installations abroad function as American enclaves permitted by consent on foreign soil, extensive problems of supply must be dealt with by agreement. Large quantities of goods are purchased abroad or shipped from the United States for maintenance and comfort; large amounts of currency are at the disposal of American personnel; substantial postal, customs, and tax arrangements must be made. In all of these areas, the absence of close, on-the-spot regulation would open the way to black-market activities, to abuse of postal and customs exemptions, and to comparable activities productive of the frictions it is essential to avoid. As we have noted, host nations receiving American forces properly look to American military authorities for prevention and punishment of such conduct. Article 2 (11) properly provides a basis for meeting this expectation.

d. The fair and effective enforcement of military law itself requires its applicability to civilians accompanying the armed forces overseas. Closely intermingled with the uniformed members of the armed forces they accompany, civilians play the important roles of witnesses as well as defendants in military trials. Unless they remain subject to the military law governing others in the military enclave, their appearance as wit-

nesses cannot be compelled, since process requiring such attendance does not run to foreign countries for civilians not subject to military law. See Article 46, UCMJ (50 U. S. C. 621). In this and other aspects, their immunity from the law governing those they live with so intimately would present stark inequities. The airplane mechanic with sergeant's stripes, the Army nurse, the WAC stenographer are all subject to trial by court-martial—whether for the gamut of assaults, drunkenness, and sex crimes which may sap the morale of the establishment, or for the black marketeering, customs, and like violations which may injure the host nation. But, appellee says, the civilian aircraft specialist and the Army wife, working or socializing or fighting or drinking with the others, can only be controlled (whether they like it or not)⁷ by foreign authorities or by

⁷ Of course, the particular convicted defendant before this Court in any case will plead for the jurisdiction to which he has *not* been subjected—for court-martial if he has had a civilian trial (*Madsen v. Kinsella*, 343 U. S. 341), for an American trial, military or civilian, if he has had a foreign trial (see *Keefe v. Dulles*, 222 F. 2d 390 (C. A. D. C.), certiorari denied, 348 U. S. 952; *United States v. Burney*, U. S. C. M. A. No. 7750, March 30, 1956, in the Appendix to the Government's Brief in *Kinsella v. Krueger*, No. 713, at pp. 83-84), or, as in the two cases here now, for civilian trial in England or Japan over trial by an American court-martial. It bears mention, therefore, that in the long vistas which must be contemplated in considering a proposed constitutional limitation, these alternatives are fairly viewed from the standpoint of prospective defendants and prospective consequences rather than that of the particular parties before

the probably impracticable device of trial by a federal district court in the United States (see *infra*, pp. 20-22). We submit that the well-established power of Congress, to provide for non-jury trial in the exercise of criminal jurisdiction in a foreign country (*In re Ross, supra*) and to provide for court-martial trial of "those directly connected with" the armed forces (*Duncan v. Kahanamoku*, 327 U. S. 304, 313; see our main brief, pp. 31-48), amply defeats the effort to impose such a restriction.

C. WIDESPREAD TREATY ARRANGEMENTS, UNDER WHICH FOREIGN NATIONS HAVE RECOGNIZED OUR RIGHT TO EXERCISE COURT-MARTIAL JURISDICTION WITHIN THEIR BORDERS OVER CIVILIANS DIRECTLY CONNECTED WITH OUR ARMED FORCES, WOULD BE IMPAIRED TO THIS NATION'S DETRIMENT IF ARTICLE 2 (11) WERE HELD INVALID.

As in the agreements with England and Japan in the two cases now before the Court, the United States has reached agreements with some sixty nations where our armed forces are stationed, recognizing our right to exercise military jurisdiction over offenses by our troops and the civilians accompanying them. Because the relevant American authority present in these foreign countries is military, it is not surprising that in these agreements the right sought and granted has permitted the exercise of *military jurisdiction*. The

the Court. In this broader perspective, Congress probably reflected no minority view when it provided a basis for trial in American tribunals when the circumstances of international arrangements render this choice preferable and available.

British note accompanying the agreement involved in the *Covert* case reflects that such concessions by our allies ordinarily represent a "very considerable departure * * * from the traditional system and practice" (main brief, appendix, p. 79), and are not lightly made. Though the appellee treats it as a matter simply accomplished (*Covert* Br. 104-105), there is neither precedent nor diplomatic experience to justify the belief that these foreign nations would similarly relinquish their jurisdiction if what we proposed was not a military⁹ trial within their borders near the scene of the offense, but a civilian trial by a court in the United States.⁸ And the possibility of setting up some sort of *ad hoc* American civilian courts in these foreign countries, apart from

⁸ The appellee's assumption that foreign nations would lightly thus relinquish their sovereignty is clearly not based upon the attitude of our own Government. To the contrary, Section 2 of the Service Courts of Friendly Foreign Forces Act (22 U. S. C. 702; see our main brief, p. 54, fn. 28) expressly provides that the arrest and delivery of a member of a friendly foreign force to the custody of an officer of such force shall be "for trial in such service courts *within the United States* for such offenses as shall lie within the jurisdiction of the service courts of such friendly foreign force" (emphasis added). Section 2 further provides that the trial of any member of such friendly foreign force for an offense against a member of the civilian population "shall be in open court (except where security consideration forbids), *shall take place promptly in the United States* and within a reasonable distance from the place where the offense is alleged to have been committed, for the convenience of witnesses." (Emphasis added.)

being impractical and a difference in form rather than substance, could not effectively meet the appellee's fallacious claim that she is entitled to a jury trial if an American court tries her there for a crime committed there.

In short, the actual arrangements among nations today, whence international law so largely derives, demonstrate⁹ that Article 2 (11) is the practicable means of providing an American rather than a foreign trial for civilians accompanying our armed forces in foreign countries and charged with offenses there. We would not wish at all to be understood to claim that trial in a foreign court is "the ultimate horrible" (Covert Br. 106), to be avoided at all costs. What we do urge, however, is that in this delicate area of international negotiation (cf. Schwartz, *International Law and the NATO Status of Forces Agreement* (1953), 53 Col. L. Rev. 1091, 1111) it would be a misfortune if Congress and the Executive found themselves powerless to arrange in appropriate cases for these concessions which so many other nations have seen fit to grant and to seek for themselves.⁹

⁹ In a letter of February 27, 1953, to the Senate urging ratification of the Status of Forces Agreement, President Eisenhower wrote:

The Status of Forces agreement of 1951 and the present protocol, as well as the companion agreement relating to the status of the North Atlantic Treaty Organization itself, are necessary parts of the new machinery we need to carry forward the vital program for the

To illustrate concretely the nature and practical operation of such concessions, we examine briefly the multilateral NATO Status of Forces Agreement (printed in part as an Appendix to this brief, pp. 32-42, *infra*). The key provision for our purposes, Article VII, recognizes at its outset that "*the military authorities of the sending*

integrated defense forces of the North Atlantic Treaty Organization. These are multilateral agreements and thus provide that basis of uniformity in these fields which is essential for NATO and its integrated operations. While these agreements do not in every respect reflect the maximum desires of each country, and to that extent represent certain compromises on the part of all, it is my considered belief that they provide a workable, equitable, and desirable framework for NATO activities and peacetime NATO military operations. The early acceptance of these agreements by the NATO nations is very important to the furtherance of the NATO collective defense effort.

On July 14, 1953, in a letter responding to a request from Senator Knowland that he state his views on the importance of this Agreement, the President said:

In my judgment, failure of the United States to ratify these agreements could seriously affect the security of the United States, for such failure could result in undermining the entire United States military position in Europe.

* * * * *

Ratification of these agreements would be a great forward step toward cementing the mutual security effort among the nations of the free world, and I earnestly hope that they will be ratified by the United States without reservations that would require their renegotiation.

Hearings before the Committee on Foreign Affairs, House of Representatives, 84th Cong., 2d Sess., on H. J. Res. 309, pp. 557, 558.

State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State *over all persons subject to the military law of that State* (par. 1 (a), *infra*, p. 35, emphasis added).¹⁰ This right is exclusive “over persons subject to the military law of [the sending] State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State” (par. 2 (a), *infra*, p. 36).¹¹ In cases of offenses against the laws of both States, jurisdiction is concurrent, and the Agreement proceeds to provide which State, in given classes of cases, shall have “the primary right to exercise jurisdiction.” This primary right is given to the “military authorities of the sending

¹⁰ There is, of course, no question that the appellee is within the terms of Article 2 (11) and in this sense subject to American military law. In considering which persons may constitutionally be subjected to American military law, the host of agreements like NATO Status of Forces, contrary to appellee’s apparent view that they are irrelevant (Covert Br. 92 *et seq.*), are obviously significant. As we have said (Br. in Opp. to Motion to Dismiss or Affirm, pp. 9–10), this is not so because such agreements themselves *create* American constitutional power (cf. Appellee’s Br. 97–102), but because this country, as a sovereign member of the community of nations, has a well-established and necessary power to make and implement such agreements. See our main brief, pp. 48–53, 61–65; and pp. 28–30, *infra*.

¹¹ Similarly, the receiving State has exclusive jurisdiction to offenses punishable by its law but not by the law of the sending State, Par. 2 (b), *infra*, p. 36.

State" over a member of its force or civilian component in relation to:

(i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty. [Par. 3 (a), *infra*, pp. 36-37.]

In all other cases, the receiving State has the primary right to exercise its concurrent jurisdiction. Par. 3 (b), *infra*, p. 37.¹²

¹² In the advice and consent to the ratification of the NATO Status of Forces Agreement, it was declared to be the sense of the Senate that the criminal jurisdiction provisions of Article VII would not constitute a precedent for future agreements (4 *U. S. Treaties* 1792, 1828), reflecting the view that, wherever possible, even broader provisions should be obtained conceding primary jurisdiction to American courts-martial. And such provisions are in fact contained in a number of other agreements. Thus, in an agreement with the Netherlands, a NATO member, effective November 16, 1954 (TIAS 3174), that Government, "recognizing that it is the primary responsibility of the United States authorities to maintain good order and discipline where persons subject to United States military law are concerned, will, upon the request of the United States authorities, waive their primary right to exercise jurisdiction under Article VII, except where they determine that it is of particular importance that jurisdiction be exercised by the Netherlands authorities." Annex, par. 3. Similarly, other NATO countries have, on a case-to-case basis, effected broad waivers of their primary right under the Agreement. *Infra*, p. 18. And certain other countries outside NATO—for example, Libya and the Philippines—have conceded to us a larger area of jurisdiction than is recognized in the Status of Forces Agreement.

The Agreement goes on, however, to provide that the State having the primary right to exercise jurisdiction "shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance" (par. 3 (c), *infra*, p. 37). This provision has been of great significance. It has been the policy of this Government, in a large majority of the instances where the problem has arisen, to seek waivers from foreign governments of their primary right to exercise jurisdiction over our nationals in uniform or accompanying our armed forces as civilians. The substantial success of this policy is attested by the fact that in the period from December 1, 1954, to November 30, 1955, out of a total of 4977 offenses subject to the jurisdiction of our NATO allies, waivers were obtained in 2840, or 57 percent.¹³ The figures for members of the civilian component and dependents accompanying the armed forces are even more striking. Out of a total of 435 in this category (166 of the civilian component and 269 dependents), waivers were obtained as to 376 (141 plus 235, respectively), or 86 percent.¹⁴

¹³ Hearings before the Committee on Foreign Affairs, House of Representatives, 84th Cong., 2d Sess., on H. J. Res. 309, p. 572.

¹⁴ *Id.*, p. 576. Similarly, under the Protocol to Amend Article XVII of the Administrative Agreement Between the United States of America and Japan (TIAS 2848, September

We think actual experience with this international problem demonstrates strikingly the fallacy in arguing that the issue in cases of this type involves a real choice between an American civilian and an American military trial. In *Toth v. Quarles*, 350 U. S. 11, this Court pointed out that the court-martial jurisdiction attempted under Article 3 (a)—applying to civilian ex-servicemen who, like Toth, would almost always be within the United States when the military jurisdiction was asserted—"necessarily encroaches on the jurisdiction of federal courts set up under Article III of the Constitution" (p. 15; see also p. 19). The overseas jurisdiction under Article 2 (11) represents no such encroachment. Instead, it provides a basis upon which this country can seek and often obtain the right to try in an American tribunal offenses which would otherwise be tried in a foreign court. It merits emphasis that this right, as it exists in point of fact, is extended solely to our military tribunals, the obviously appropriate forums present in the foreign countries. Unless we are able to exercise this right, it must be waived in favor of the jurisdiction of the foreign country's courts. See Status of Forces Agreement, Article VII, par. 3

29, 1953, 4 U. S. *Treaties* 1846) (which was modeled upon the NATO Status of Forces Agreement), in the period from December 1, 1954, to November 30, 1955, out of 366 cases involving members of the civilian component and dependents, waivers were obtained in 355, some 97%. *Id.*, p. 608.

(c). The possibility that some sixty agreements could be renegotiated to provide for an unprecedented arrangement under which foreign nations would waive their local jurisdiction in favor of a jury trial in the United States, far from the scene of the offense, seems quite slim.¹⁵ We submit, in any event, that this Government is not *required* to relinquish the American jurisdiction it enjoys under the widespread net of international agreements now in force, a jurisdiction which has proved acceptable to the other nations. The exercise of this jurisdiction by military tribunals, the procedures of which have been carefully fashioned by Congress to insure due process for the millions of Americans unquestionably subject to them, is fully authorized by the Constitution.

D. EVEN ON THE UNLIKELY ASSUMPTION THAT FOREIGN COUNTRIES WOULD WAIVE THEIR LOCAL JURISDICTION FOR THIS PURPOSE, JURY TRIAL IN THE UNITED STATES WOULD ORDINARILY BE IMPRACTICABLE

In addition to finding, on her own, that foreign trials would be perfectly acceptable in the generality of cases over which foreign courts (but for our agreements) would normally exercise jurisdiction, the appellee maintains (Covert Br. 103-107) that the only alternative available for providing an American trial is in a civilian court

¹⁵ We have noted in our main brief (p. 46) one express indication of the view which could readily have been anticipated—that for certain crimes within its borders, if it is to waive its own normal jurisdiction, a foreign country would expect the trial to be held there. And see the views of this country reflected in our statute quoted in fn. 8, p. 13, *supra*.

in this country, with a jury. This alternative might occasionally be feasible in the case of very grave and perhaps spectacular offenses, but it cannot ordinarily serve as a practicable solution for the problems now handled under Article 2 (11).

While they are deprecated by the appellee (Covert Br. 107) as crass considerations of "economy," it seems clear that there would be enormous, frequently insurmountable difficulties in bringing witnesses to the United States for trial. The attendance of foreign witnesses in this country could not be compelled; on the other hand, under our international agreements, foreign governments often undertake to assist in producing their people as witnesses for our trials there.¹⁶ Even if the Government could effectively handle this problem on its own behalf in the generality of cases, at considerable cost, the expense and frequent impossibility of bringing defense witnesses so far from the scene of the crime would be an obstacle defendants might well find intolerable; on the other hand, Article 46 of the Uniform Code (50 U. S. C. 621) assures to the defense an equal opportunity to obtain witnesses. And there would clearly be a serious loss in military efficiency and in morale if, for the fairly substantial number of cases involved (*supra*, p. 3), uni-

¹⁶ See e. g., TIAS 3426, October 23, 1954 (Germany); TIAS 3107, September 9, 1954 (Libya); TIAS 2964, May 22, 1953 (Ethiopia); TIAS 2295, May 8, 1951 (Iceland); cf. NATO Status of Forces Agreement, Article VII (6) (a), *infra*, p. 38.

formed and civilian personnel from overseas had regularly to be taken from their work and brought here as witnesses in the district courts.

The result of the appellee's suggestion would inevitably be a practical inability, at least in many of the lesser cases, to provide for any American trial of any kind. Cf. *In re Ross*, 140 U. S. 453, 464-465. The appellee's conclusion that a foreign trial should, therefore, be acceptable is not without supporters. On the other hand, there are those who argue that we have gone too far already in tolerating foreign jurisdiction over our nationals.¹⁷ This is not the forum, of course, for resolving such difficult issues of international policy. Nevertheless, if the restriction for which the appellee contends were accepted, there would be a resolution *pro tanto* on constitutional, not policy, grounds. For if Article 2 (11) is held invalid, it becomes highly unlikely, at least for the foreseeable future, that there will be exercised over civilians accompanying our armed forces the American jurisdiction in foreign countries which those countries have agreed to recognize and which they, in turn, have obtained for themselves. That result may or may not be desirable, but it is not one compelled by the Constitution.

¹⁷ See, for example, the sharp opposition to acceptance of the NATO Status of Forces Agreement. *E. g.*, 99 Cong. Rec. 4979-80, 8731 *et seq.* See also the current Bow Resolution, H. J. Res. 309, 84th Cong., 1st Sess. (Hearings, *supra*, note 13), which would require that we seek elimination of such foreign jurisdiction. See also fn. 12, *supra*, p. 17.

II

THE WAR POWER AND THE POWER TO PROVIDE FOR TRIAL IN A FOREIGN COUNTRY WITHOUT A JURY, AS WELL AS THE POWER TO MAKE RULES GOVERNING THE LAND AND NAVAL FORCES, ARE CLEARLY RELEVANT IN SUSTAINING ARTICLE 2. (11)

A constant premise running through the appellee's brief is that, peculiarly for purposes of this case, the power under Article I, Sec. 8, Cl. 14, of the Constitution, "To make Rules for the Government and Regulation of the land and naval Forces," must be read in a sealed vacuum. She acknowledges that the war power has in the past sustained provisions for trial by court-martial of civilians "directly connected" with the armed forces, but declares this power irrelevant here. She recognizes that *In re Ross*, 140 U. S. 453, established that an American tribunal exercising criminal jurisdiction in a foreign country for an offense in that country—jurisdiction which would normally be exercised by a foreign court—need not be a constitutional court and need not proceed by indictment or with a jury. But the constitutional rule of that case, recognized as closely in point by several authorities which have considered it in the present connection,¹⁸ she de-

¹⁸ See *United States v. Burney*, U. S. C. M. A. No. 7750, March 30, 1956, in the Appendix to our Brief in *Kinsella v. Krueger*, No. 713, pp. 55-58; the District Court's opinion in *Krueger*, R. 16-17; and Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 96-97 (1920).

clares (Covert Br. 84-85) to be utterly irrelevant because it does not amend the phrase "land and naval Forces" in Article I, Sec. 8, Cl. 14. We submit that this attempted splintering of the Constitution is fallacious, and that the constitutional provisions we have invoked, together with the "land and naval Forces" clause of Article I, sustain the statute under attack, separately and in combination.¹⁹

¹⁹ We note in passing appellee's suggestion (Covert Br. 39, 102) that the Necessary and Proper Clause, since *Toth v. Quarles*, *supra*, can have no bearing on the exercise of the power under Article I, Sec. 8, Cl. 14, to make rules for the government and regulation of the land and naval forces. Long ago, however, this Court plainly declared that the Necessary and Proper Clause is to be read in aid of Article I, Sec. 8, Cl. 14, as it is read with the other Article I powers, and this would seem to be required by the plain constitutional language in Clause 18 conferring power "To make all Laws which shall be necessary and proper for carrying into Execution the foregoing Powers," without exception. *Johnson v. Sayre*, 158 U. S. 109, 114. We find nothing in the *Toth* opinion which overrules this view and declares that the Necessary and Proper Clause must be read as if it referred to all of "the foregoing Powers" except that conferred by Clause 14. To be sure, this Court declared in *Toth* (p. 23), quoting *Anderson v. Dunn*, 6 Wheat. 204, 230-231, that the power under Clause 14 must be limited to "the least possible power adequate to the end proposed." Mindful of that sharply restrictive language, we nevertheless believe that there remains with respect to Clause 14, as with the other powers of Congress, at least some scope for the exercise of the legislative judgment contemplated by the Necessary and Proper Clause. And it is our effort here to show that the judgment in this instance finds ample sanction in Clause 14, together with the other sources of power we invoke.

A. THE WAR POWER

Among the cases upholding court-martial jurisdiction over civilians, we have referred to such instances as the trial of a Quartermaster employee in Camp Jackson, South Carolina (*Hines v. Mikell*, 259 Fed. 28 (C. A. 4), certiorari denied, 250 U. S. 645), and the trial of another Quartermaster employee on the Mexican border where the troops he was with were concerned with the intermittent raids of bandits (*Ex parte Jochen*, 257 Fed. 200 (S. D. Tex.)). Both of these cases, cited with approval by this Court as reflecting a "well-established" power (*Duncan v. Kahana-moku*, 327 U. S. 304, 313, fn. 7), arose during World War I. On this ground, the appellee seeks to explain them away, along with many others. They involved, she says, the exercise of the war power, and are, of course, clearly correct on that ground (Covert Br. 51). Here, however, she claims (Covert Br. 77-78) that the war power cannot possibly be relevant.

We note and emphasize in this connection that, as the appellee concedes (Covert Br. 75), the provision in Clause 14 of power to make rules for the government and regulation of the land and naval forces makes no reference to war or peace. And, of course, this provision is fairly to be read with the closely related and immediately preceding powers to declare war (Cl. 11), to raise armies (Cl. 12), and to provide a navy (Cl. 13). See *Ex*

parte Gerlach, 247 Fed. 616, 648 (S. D. N. Y.). In this light, the brief comments the appellee makes (Covert Br. 77-78) wholly fail to show how the war power may be dismissed from *these* cases while it serves to explain and justify the cases she accepts. In the latter cases, because a declared war was in progress, civilians were tried by court-martial *within the United States*, where the civilian courts were open and peacefully functioning, and where such persons would normally have a civilian trial by an American jury. To-day, in a climate of potential danger, our forces are in many foreign lands, and the civilians accompanying them are subject to trial by American courts-martial for offenses which would normally be triable in foreign courts, often in foreign tongues, by foreign procedures. The two situations, both formerly covered by Article 2 (d) and now separated in Articles 2 (10) and 2 (11) of the Uniform Code, were distinguished by Congress, for reasons of clarity, to deal with different aspects of war and preparations for war.²⁰ Time

²⁰ We stop here to disclaim our opponent's approval in *Kinsella v. Krueger*, No. 713, Resp. Br. pp. 12-16, of our omission to bring before this Court for review the contention that Article 2 (10) of the Uniform Code also justifies court-martial jurisdiction in that case. In that case, we invoked the extraordinary procedure of certiorari before judgment, not only because the validity of Article 2 (11) is important, but also, and in large measure, because the *Covert* case is here presenting the problem. See our petition for certiorari, pp. 5-7. In the *Covert* case, only Article 2 (f1) had been raised in the District Court and brought here. Moreover,

continues to vindicate its judgment that both situations are appropriate for court-martial jurisdiction and both draw significant support from the war power.

Surely, the answer to our question here cannot turn on whether the danger in South Carolina in 1918 was greater than in England in 1953, jet-minutes from everywhere in Europe, or in Japan in 1952, on the troubled coasts of Asia and near the fighting in Korea. It is enough that the war power is in strenuous and costly operation when large military establishments with their civilian contingents are posted around the world. And the powers which justify court-martial jurisdiction over civilians within the United States in time of declared war are sufficient to sustain such jurisdiction overseas, in the circumstances of the

in *Krueger*, the District Court does not appear to have ruled on Article 2 (10), and held that Article 2 (11) sufficiently sustained court-martial jurisdiction. Indeed, since, as respondent's discussion in *Krueger* reveals (*Krueger* Br. 13-16), the question of when our forces are "in the field" within the meaning of Article 2 (10) involves a largely factual analysis, it is questionable whether the materials before the District Court were adequate for decision on this point.

The fact remains, however, that when Mrs. Smith, the defendant in the *Krueger* case, killed her husband in Japan, hostilities were in progress in nearby Korea. Japan was in fact a staging area for that conflict and a base for aerial missions. There is, in our view, substantial ground for holding Article 2 (10) applicable. In the event of reversal in that case on the ground that Article 2 (11) is invalid, that question should remain open on the remand.

post-World War II world, over civilians intimately and relatively permanently connected with our armed forces there.

B. THE POWER TO EXERCISE CRIMINAL JURISDICTION WITHOUT A JURY IN A FOREIGN COUNTRY FOR A CRIME COMMITTED THERE

Foregoing the unprofitable effort to seek overruling of the unanimous decision in *In re Ross*, 140 U. S. 453, which has been approved and never doubted in the sixty-five years since its rendition,²¹ the appellee dismisses briefly (Covert Br. 84-86) our argument that it is squarely applicable here. The distinction, she says, is that *In re Ross* concerned an overseas trial without a jury in a consular court, and that Article I, Sec. 8, Cl. 14, does not state that similar jurisdiction may be conferred upon a court-martial trying an offense in a foreign country.

But the Constitution says nothing whatsoever about consular courts, or indeed about any kind of American court overseas. Clearly, any attempt to find a literal statement in the Constitution establishing the jurisdiction upheld in *In re Ross* must fail. Nevertheless, the principles there announced are quickly stated and readily seen to apply here. Those principles are (1)

²¹ See, e. g., *Ex parte Bakelite Corporation*, 279 U. S. 438, 451, referring to the "well recognized" power to exercise criminal jurisdiction in foreign countries without a jury sustained in *In re Ross*.

that the United States, like other sovereigns in a multi-nation world, is empowered to "make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein" (140 U. S. at 463) and (2) that tribunals so constituted may adjudicate criminal liability for the most serious offenses without indictment or trial by jury (*id.* at 463-465). Under these principles, Congress may surely employ the courts-martial it is empowered to create by Article I, Sec. 8, Cl. 14, to exercise judicial authority in other countries.

There is no basis for a constitutional distinction in the fact that *Ross* involved civilian consular officials while, for purposes of civilians accompanying the armed forces overseas, similar jurisdiction is conferred upon regularly constituted and carefully regulated military tribunals. If anything, the propriety of military jurisdiction of this type would seem clearer than that of the *ad hoc* consular tribunal. As we have shown, civilians accompanying the armed forces overseas live intimately with and as part of the military establishment; the military has daily responsibility for their welfare and their conduct; their actions may impede or injure directly and immediately the mission of the military force. There is no such continuing relationship between a con-

sular officer and an American, even a seaman, abroad. Moreover, the closely safeguarded system of military justice—with its provisions for careful preliminary investigation (Article 32, UCMJ, 50 U. S. C. 603), legally trained judicial officers and counsel for both sides (Articles 26, 27, and 38, 50 U. S. C. 590, 591, and 613), and other protections designed by Congress to protect the millions of Americans subject to the system—undoubtedly compares most favorably with that of the consular tribunals sustained in *Ross*.²²

²² While the procedures followed by the consular court in *Ross* are not detailed in the opinion, it is there noted that arrest, arraignment, and trial were authorized on the basis of facts within the consul's own knowledge, "or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister" (140 U. S. at 469). With this compare the requirements under the Uniform Code that before charges are referred for trial to a general court-martial—*i. e.*, before a trial which may result in confinement for over six months—there must be (1) a thorough and impartial investigation at which the accused is entitled to be represented by counsel, to cross-examine available witnesses against him, "and to present anything he may desire in his own behalf" (Article 32, *supra*), opportunities which do not exist, it may be noted, before a grand jury, and (2) a reference by the convening authority "to his staff judge advocate or legal officer for consideration and advice" (Article 34, 50 U. S. C. 605).

The appellee refers (Covert Br. 112-116) to cases where the Court of Military Appeals has *reversed* convictions as showing the inadequacy of military justice. Obviously, a similar culling from the opinions of this or any other appellate court could lead to similar animadversions against civilian justice.

Respectfully submitted.

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MAY 1956.

APPENDIX

The NATO Status of Forces Agreement (TIAS 2846) provides in part as follows:

ARTICLE I

1. In this Agreement the expression—

(a) "force" means the personnel belonging to the land, sea or air armed services of one Contracting Party when in the territory of another Contracting Party in the North Atlantic Treaty area in connexion with their official duties, provided that the two Contracting Parties concerned may agree that certain individuals, units or formations shall not be regarded as constituting or included in a "force" for the purposes of the present Agreement;

(b) "civilian component" means the civilian personnel accompanying a force of a Contracting Party who are in the employ of an armed service of that Contracting Party, and who are not stateless persons, nor nationals of any State which is not a Party to the North Atlantic Treaty, nor nationals of, nor ordinarily resident in, the State in which the force is located;

(c) "dependent" means the spouse of a member of a force or of a civilian component, or a child of such member depending on him or her for support;

(d) "sending State" means the Contracting Party to which the force belongs;

(e) "receiving State" means the Contracting Party in the territory of which

the force or civilian component is located, whether it be stationed there or passing in transit;

(f) "military authorities of the sending State" means those authorities of a sending State who are empowered by its law to enforce the military law of that State with respect to members of its forces or civilian components;

(g) "North Atlantic Council" means the Council established by Article 9 of the North Atlantic Treaty or any of its subsidiary bodies authorised to act on its behalf.

2. This Agreement shall apply to the authorities of political sub-divisions of the Contracting Parties; within their territories to which the Agreement applies or extends in accordance with Article XX, as it applies to the central authorities of those Contracting Parties, provided, however, that property owned by political sub-divisions shall not be considered to be property owned by a Contracting Party within the meaning of Article VIII.

ARTICLE II

It is the duty of a force and its civilian component and the members thereof as well as their dependents to respect the law of the receiving State, and to abstain from any activity inconsistent with the spirit of the present Agreement, and, in particular, from any political activity in the receiving State. It is also the duty of the sending State to take necessary measures to that end.

ARTICLE III

1. On the conditions specified in paragraph 2 of this Article and subject to compliance with the formalities established by the receiving State relating to entry and departure of a force or the members thereof, such members shall be exempt from passport and visa regulations and immigration inspection on entering or leaving the territory of a receiving State. They shall also be exempt from the regulations of the receiving State on the registration and control of aliens, but shall not be considered as acquiring any right to permanent residence or domicile in the territories of the receiving State.

2. The following documents only will be required in respect of members of a force. They must be presented on demand:

(a) personal identity card issued by the sending State showing names, date of birth, rank and number (if any), service, and photograph:

(b) individual or collective movement order, in the language of the sending State and in the English and French languages, issued by an appropriate agency of the sending State or of the North Atlantic Treaty Organisation and certifying to the status of the individual or group as a member or members of a force and to the movement ordered. The receiving State may require a movement order to be countersigned by its appropriate representative.

3. Members of a civilian component and dependents shall be so described in their passports.

4. If a member of a force or of a civilian component leaves the employ of the sending State and is not repatriated, the

authorities of the sending State shall immediately inform the authorities of the receiving State, giving such particulars as may be required. The authorities of the sending State shall similarly inform the authorities of the receiving State of any member who has absented himself for more than twenty-one days.

5. If the receiving State has requested the removal from its territory of a member of a force or civilian component or has made an expulsion order against an ex-member of a force or of a civilian component or against a dependent of a member or ex-member, the authorities of the sending State shall be responsible for receiving the person concerned within their own territory or otherwise disposing of him outside the receiving State. This paragraph shall apply only to persons who are not nationals of the receiving State and have entered the receiving State as members of a force or civilian component or for the purpose of becoming such members, and to the dependents of such persons.

* * * * *

ARTICLE VII

1. Subject to the provisions of this Article,

(a) the military authorities of the sending State shall have the right to exercise within the receiving State all criminal and disciplinary jurisdiction conferred on them by the law of the sending State over all persons subject to the military law of that State;...

(b) the authorities of the receiving State shall have jurisdiction over the members of a force or civilian component and their

dependents with respect to offences committed within the territory of the receiving State and punishable by the law of that State.

2.—(a) The military authorities of the sending State shall have the right to exercise exclusive jurisdiction over persons subject to the military law of that State with respect to offences, including offences relating to its security, punishable by the law of the sending State, but not by the law of the receiving State.

(b) The authorities of the receiving State shall have the right to exercise exclusive jurisdiction over members of a force or civilian component and their dependents with respect to offences, including offences relating to the security of that State, punishable by its law but not by the law of the sending State.

(c) For the purposes of this paragraph and of paragraph 3 of this Article a security offence against a State shall include

- (i) treason against the State;
- (ii) sabotage, espionage or violation of any law relating to official secrets of that State, or secrets relating to the national defence of that State.

3. In cases where the right to exercise jurisdiction is concurrent the following rules shall apply:

(a) The military authorities of the sending State shall have the primary right to exercise jurisdiction over a member of a force or of a civilian component in relation to

- (i) offences solely against the property or security of that State, or offences solely against the person or property of another member of the force or civilian component of that State or of a dependent;

(ii) offences arising out of any act or omission done in the performance of official duty.

(b) In the case of any other offence the authorities of the receiving State shall have the primary right to exercise jurisdiction.

(c) If the State having the primary right decides not to exercise jurisdiction, it shall notify the authorities of the other State as soon as practicable. The authorities of the State having the primary right shall give sympathetic consideration to a request from the authorities of the other State for a waiver of its right in cases where that other State considers such waiver to be of particular importance.

4. The foregoing provisions of this Article shall not imply any right for the military authorities of the sending State to exercise jurisdiction over persons who are nationals of or ordinarily resident in the receiving State, unless they are members of the force of the sending State.

5.—(a) The authorities of the receiving and sending States shall assist each other in the arrest of members of a force or civilian component or their dependents in the territory of the receiving State and in handing them over to the authority which is to exercise jurisdiction in accordance with the above provisions.

(b) The authorities of the receiving State shall notify promptly the military authorities of the sending State of the arrest of any member of a force or civilian component or a dependent.

(c) The custody of an accused member of a force or civilian component over whom the receiving State is to exercise jurisdiction shall, if he is in the hands of the send-

ing State, remain with that State until he is charged by the receiving State.

6.—(a) The authorities of the receiving and sending States shall assist each other in the carrying out of all necessary investigations into offences, and in the collection and production of evidence, including the seizure and, in proper cases, the handing over of objects connected with an offence. The handing over of such objects may, however, be made subject to their return within the time specified by the authority delivering them.

(b) The authorities of the Contracting Parties shall notify one another of the disposition of all cases in which there are concurrent rights to exercise jurisdiction.

7.—(a) A death sentence shall not be carried out in the receiving State by the authorities of the sending State if the legislation of the receiving State does not provide for such punishment in a similar case.

(b) The authorities of the receiving State shall give sympathetic consideration to a request from the authorities of the sending State for assistance in carrying out a sentence of imprisonment pronounced by the authorities of the sending State under the provision of this Article within the territory of the receiving State.

8. Where an accused has been tried in accordance with the provisions of this Article by the authorities of one Contracting Party and has been acquitted, or has been convicted and is serving, or has served, his sentence or has been pardoned, he may not be tried again for the same offence within the same territory by the authorities of another Contracting Party. However, nothing in this paragraph shall prevent

the military authorities of the sending State from trying a member of its force for any violation of rules of discipline arising from an act or omission which constituted an offence for which he was tried by the authorities of another Contracting Party.

9. Whenever a member of a force or civilian component or a dependent is prosecuted under the jurisdiction of a receiving State he shall be entitled—

(a) to a prompt and speedy trial;
(b) to be informed, in advance of trial, of the specific charge or charges made against him;

(c) to be confronted with the witnesses against him;

(d) to have compulsory process for obtaining witnesses in his favour, if they are within the jurisdiction of the receiving State;

(e) to have legal representation of his own choice for his defence or to have free or assisted legal representation under the conditions prevailing for the time being in the receiving State;

(f) if he considers it necessary, to have the services of a competent interpreter; and

(g) to communicate with a representative of the Government of the sending State and, when the rules of the court permit, to have such a representative present at his trial.

10.—(a) Regularly constituted military units or formations of a force shall have the right to police any camps, establishments or other premises which they occupy as the result of an agreement with the receiving State. The military police of the force may take all appropriate measures to ensure the

maintenance of order and security on such premises.

(b) Outside these premises, such military police shall be employed only subject to arrangements with the authorities of the receiving State and in liaison with those authorities, and in so far as such employment is necessary to maintain discipline and order among the members of the force.

11. Each Contracting Party shall seek such legislation as it deems necessary to ensure the adequate security and protection within its territory of installations, equipment, property, records and official information of other Contracting Parties, and the punishment of persons who may contravene laws enacted for that purpose.

* * * * *

ARTICLE IX

1. Members of a force or of a civilian component and their dependents may purchase locally goods necessary for their own consumption, and such services as they need, under the same conditions as the nationals of the receiving State.

2. Goods which are required from local sources for the subsistence of a force or civilian component shall normally be purchased through the authorities which purchase such goods for the armed services of the receiving State. In order to avoid such purchases having any adverse effect on the economy of the receiving State, the competent authorities of that State shall indicate, when necessary, any articles the purchase of which should be restricted or forbidden.

* * * * *

5. When a force or a civilian component has at the place where it is stationed inadequate medical or dental facilities, its members and their dependents may receive medical and dental care, including hospitalisation, under the same conditions as comparable personnel of the receiving State.

* * * * *

ARTICLE XIII

1. In order to prevent offences against customs and fiscal laws and regulations, the authorities of the receiving and of the sending States shall assist each other in the conduct of enquiries and the collection of evidence.

2. The authorities of a force shall render all assistance within their power to ensure that articles liable to seizure by, or on behalf of, the customs or fiscal authorities of the receiving State are handed to those authorities.

3. The authorities of a force shall render all assistance within their power to ensure the payment of duties, taxes and penalties payable by members of the force or civilian component or their dependents.

4. Service vehicles and articles belonging to a force or to its civilian component, and not to a member of such force or civilian component, seized by the authorities of the receiving State in connexion with an offence against its customs or fiscal laws or regulations shall be handed over to the appropriate authorities of the force concerned.

ARTICLE XIV

1. A force, a civilian component and the members thereof, as well as their dependents, shall remain subject to the foreign exchange regulations of the sending State and shall also be subject to the regulations of the receiving State.

2. The foreign exchange authorities of the sending and the receiving States may issue special regulations applicable to a force or civilian component or the members thereof as well as to their dependents.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

**CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, Appellant,**

v.

CLARICE B. COVERT

**Appeal from the United States District Court for the
District of Columbia**

MOTION TO DISMISS OR AFFIRM

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, SUPERINTENDENT OF THE DISTRICT OF
COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

Appeal from the United States District Court for the
District of Columbia

MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16(1), appellee moves that the appeal be dismissed for the want of jurisdiction, or, in the alternative, that the judgment below be affirmed.

I. THE APPEAL SHOULD BE DISMISSED BECAUSE NOT WITHIN 28 U. S. C. § 1252, INASMUCH AS APPELLANT IS NOT AN OFFICER OR EMPLOYEE OF THE UNITED STATES OR ANY OF ITS AGENCIES.

The Court has no jurisdiction of this appeal for the reason that appellant is only an officer or employee

of the District of Columbia, and thus does not come within 28 U. S. C. §1252 as an officer or employee of the United States or of any of its agencies. The appeal must therefore be dismissed.

1. There are three requirements for a direct appeal under 28 U. S. C. § 1252:

First, the proceeding must be a civil action; that requirement is met, as of course habeas corpus is a civil proceeding. E.g., *Gonzales v. Cunningham*, 164 U. S. 612, 618.

Second, an Act of Congress must have been held unconstitutional by a United States District Court; and it is clear from the opinion of Judge Tamm (Jur. St. App. 1a-3a) that he meant to, and did, hold that Article 2(11) of the Uniform Code of Military Justice, 50 U. S. C. § 552(11), was unconstitutional, certainly as applied to the appellee.¹

Third, "the United States or any of its agencies, or any officer or employee thereof" must be a party to the cause. At this juncture, appellant fails to establish jurisdiction for this Court to entertain his appeal, because he is not within the statute.²

2. Appellant is, as the caption of the case shows, Superintendent of the District of Columbia Jail. As

¹ It is sufficient for jurisdiction under 28 U. S. C. § 1252 that the application of the Act be held unconstitutional in the circumstances of the particular case. *Fleming v. Rhodes*, 331 U. S. 100.

² It is not, nor could it be, contended that the United States is a party because, in this habeas corpus proceeding, the petition was captioned "United States of America on the relation of Clarice B. Covert" (Jur. St. App. 1a). Indeed, appellant in his Jurisdictional Statement entitles the present case simply *Curtis Reid, etc. v. Clarice B. Covert*, dropping out entirely the U. S. *ex rel.*

such, he was formerly appointed and removed by the Commissioners of the District upon recommendation of the Board of Public Welfare (D. C. Code (1951 ed.) §§ 24-409, 24-411), but, since the reorganization of the District of Columbia Government, he is now subject to the supervision of the Director of the Department of Corrections, who in turn is appointed by the Commissioners. See Reorganization Order No. 34, in the Appendix to Title 1 of Supp. III to the 1951 Edition of the D. C. Code.

At any rate, appellant is an officer of the District of Columbia, and as such is neither an officer of the United States nor of any agency thereof.

The District of Columbia, both before and after the inauguration of its present system of government by three Commissioners, has uniformly been held to be a municipal corporation separate and distinct from the United States, and enjoying none of the general government's immunities. *Barnes v. District of Columbia*, 91 U. S. 540; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1; *District of Columbia v. Woodbury*, 136 U. S. 450. See the *Metropolitan R. Co.* case, 132 U. S. at 7-8, where it was contended

“that the government of the District of Columbia is a department of the United States government, and that the corporation is a mere name, and not a person in the sense of the law, distinct from the government itself. We cannot assent to this view. It is contrary to the express language of the statutes. That language is that the District shall ‘remain and continue a municipal corporation,’³ with all rights of action and suits for and against it. If it were a department of the government,

³ Compare the present provisions, D. C. Code (1951 ed.) §§ 1-102, 1-105.

how could it be sued? Can the Treasury Department be sued; or any other department? We are of opinion that the corporate capacity and corporate liabilities of the District of Columbia remain as before, and that its character as a mere municipal corporation has not been changed."

The foregoing principle has been applied in a variety of situations. Specifically, it has been held that officers of the District of Columbia are not officers of the United States, whether they sue for pay in the Court of Claims (*Bundy v. United States*, 21 C. Cls. 429) or whether it is sought to impose on them liabilities attaching to federal employment (*Donovan v. United States*, 21 C. Cls. 120): Employees of the District of Columbia, not being employees of the United States, are not within the civil service laws that apply to the latter (*Griffith v. Rudolph*, 298 Fed. 672 (App. D. C.); 22 Op. Att'y Gen. 59; 29 Op. Att'y Gen. 410). The same distinction between the District and its employees, on the one hand, and the United States and the latter's employees, on the other, has been recognized by the accounting officers of the Government (13 Comp. Dec. 262; 13 *id.* 533). And the District of Columbia has been held not to be a "federal agency" within the meaning of the Federal Tort Claims Act, 28 U. S. C. §§ 2671 *et seq.* *Douffas v. Johnson*, 83 F. Supp. 644 (D. D. C.).⁴

⁴ *O'Toole v. United States*, 206 F. 2d 912 (C. A. 3), is not to the contrary. There alleged acts of negligence on the part of District of Columbia National Guardsmen engaged in summer training were held to be within the Federal Tort Claims Act. But the holding rested, not on the proposition that employees of the District of Columbia are employees of the United States, but specifically on the ground that, in view of the command arrangements governing the District of Columbia National Guard, its members were not in any sense employees of the District of Columbia.

3. The same distinction between the General Government and the District of Columbia has up to now also been recognized in legislation dealing with the jurisdiction of this Court. Thus in *American Security Co. v. District of Columbia*, 224 U. S. 491, it was held that local laws governing the District, even though enacted by the Congress, were not included in "any law of the United States" within the statute then authorizing appeals to this Court.

If, therefore, in the face of this unbroken line of decisions and rulings showing the District of Columbia to be separate and distinct from the United States, Congress had desired in 28 U. S. C. § 1252 to accord to the District of Columbia the hitherto rejected status of an "agency" of the United States, or had intended to assimilate employees of the District to those of the United States for purposes of the direct appeal authorized by that section, it would—and could—have used apt language to that effect. Neither the legislative history of 28 U. S. C. § 1252, nor that of Sec. 2 of the Act of August 24, 1937,⁵ from which it was drawn, reflect any such purpose. And, significantly enough, when Congress intended to include any "person acting under" any officer of the United States or any agency thereof in a portion of 28 U. S. C. conferring federal jurisdiction, it used apt words to that end. See 28 U. S. C. § 1442(a)(1); *People of State of Colorado v. Maxwell*, 125 F. Supp. 18 (D. Colo.), motion for leave to file petition for prohibition or mandamus denied, *sub nom. State of Colorado v. Knous*, 348 U. S. 941. Undoubtedly, appellant in this case is a "person acting under" the officers of the Air Force who desired him

⁵ C. 754, 50 Stat. 751, 752; see H. R. Rep. 212, S. Rep. 963, both 75th Cong., 1st sess.; 81 Cong. Rec. 8609, 8705.

to confine appellee (Exh. I to Appellant's return). But the question here concerns not § 1442(a)(1) but § 1252, and the latter provision does not contain the "person acting under" clause.

If the United States had intervened as a party, under 28 U. S. C. § 2403, the situation would now be different. But it did not choose to intervene, although the appellant was represented by the United States Attorney below.*

4. The result is that this appeal must be dismissed for want of jurisdiction.

II. ALTERNATIVELY, IF JURISDICTION IS HELD TO EXIST, THEN THE JUDGMENT SHOULD BE AFFIRMED, INASMUCH AS *TOOTH v. QUARLES*, 350 U. S. 11, PLAINLY ESTABLISHES THE UNCONSTITUTIONALITY OF ANY STATUTE SEEKING TO SUBJECT CIVILIANS TO COURT-MARTIAL JURISDICTION IN TIME OF PEACE.

But, assuming that there is jurisdiction of this appeal, then the judgment should be affirmed, for the reason that *Toth v. Quarles*, 350 U. S. 11, renders the substantive questions herein so unsubstantial that further argument is not required.

A. The *Toth* case demonstrates the unconstitutionality of Article 2(11) of the Uniform Code of Military Justice

1. In *Toth v. Quarles*, 350 U. S. 11, decided at the present Term, this Court held that the clause "cases arising in the land or naval forces" in the Fifth Amendment did not constitute a grant of court-martial jurisdiction; that the power granted Congress in Clause 14 of Article I, Section 8, "To make Rules for the Government and Regulation of the land and naval

* It was doubtless for this reason that the district judge did not specifically certify the cause to the Attorney General.

Forcés" "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces"; and that Clause 14 is to be narrowly construed and is not broadened by anything in the Necessary and Proper Clause.

Since, as was there held, an ex-soldier could in consequence of the foregoing not be tried by court-martial, it would seem to follow as an *a fortiori* proposition that one who had been a civilian all of her life could not be subjected to military jurisdiction in time of peace either. That was the view of the district judge here (Jur. St. App. 2a). And the Solicitor General had earlier conceded as much in the *Toth* case (U. S. Br., No. 3 this Term, p. 31, n. 14): "Indeed, we think the constitutional case is, if anything, clearer for the court-martial of *Toth*, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces."

In thus denying, in *Toth*, the power to subject former soldiers to military jurisdiction, the Court was simply affirming what Colonel Winthrop had always maintained as to the unconstitutionality of similar recapture provisions. 1 Winthrop, *Military Law and Precedents* (2d ed. 1896) *144-146 [1920 reprint, pp. 105-107]. And the necessary implication of *Toth*, that there is no constitutional power to subject a civilian to court-martial jurisdiction in time of peace, not only follows what Winthrop stoutly maintained, but is also in accord with the published views of successive Judge Advocates General of the Army over many years. Neither the scope of the *Toth* case, therefore, nor the ruling below in this case, can be dismissed as recent revelations unsuspected by earlier generations of military lawyers.

2. Winthrop laid it down in uncompromising italics (*op. cit. supra* at *146 [1920 reprint, p. 107]) that "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"

And for some forty years, from 1866 through 1906, there were published to the service and to the public rulings of The Judge Advocate General of the Army to the same effect. The following paragraphs are from p. 513 of the 1912 Digest of Opinions:

"VIII G 2 a. By the sixth amendment of the Constitution, civilians are guaranteed the right of trial by jury 'in all criminal prosecutions.' Thus—in time of peace—a court-martial can not assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial. [Citing rulings from 1866 to 1905.]"

"VIII G 2 a. (1). *Held* that any statute which attempts to give jurisdiction over civilians, in time of peace, to military courts is unconstitutional. [Citing rulings from 1879 to 1906.]"

3. But when General Crowder appeared before Congress in 1912 and 1916 to urge the enactment of Article of War 2(d) of 1916, the precursor of Article 2(11) of the Uniform Code of Military Justice, see Jur. St. 11-14, *he never advised Congress that Colonel Winthrop and a whole series of his own predecessors had uniformly considered such provisions unconstitutional!* And it is fair to say that at no time thereafter, as Congress considered and enacted successive amendments to and revisions of the military code, were the

earlier views ever brought to its attention. Indeed, Congress was not even advised of the existence of a constitutional question.

Therefore, when appellant states (Jur. St. 9) that "The concept of subjecting to military jurisdiction civilians accompanying armies is not new", he utters a half-truth that, certainly with respect to American military codes, is tantamount to misrepresentation. For, as Winthrop shows, the jurisdiction traditionally exercised over civilian camp-followers was a narrowly construed power limited to time of war or actual hostilities, and to the actual area of such war or hostilities. Winthrop, *131-138 [1920 reprint, pp. 97-102]. That is the jurisdiction conferred by Article 2(10) of the Uniform Code, "In time of war, all persons serving with or accompanying an armed force in the field"; that is the outer limit of the jurisdiction over those persons who, though not members of the armed forces, may properly be tried by court-martial as a "part" thereof, see 350 U. S. at 15; that is the constitutional boundary of court-martial jurisdiction over civilians. It was not until 1916 and thereafter that, in ignorance of prior rulings, unaware even of the existence of a constitutional question, Congress first sought to subject civilians to trial by court-martial in time of peace.

Significantly enough, the decisions in the lower federal courts relied on by appellant (Jur. St. 14) all involve either cases arising in time of war⁷ or else

⁷ *Ex parte Gertach*, 247 Fed. 616 (S. D. N. Y.); *Perlstein v. United States*, 151 F. 2d 167 (C. A. 3), certiorari granted, 327 U. S. 777, and dismissed, 328 U. S. 822; *In re Berue*, 54 F. Supp. 252 (S. D. Ohio).

cases arising in occupied territory.⁸ The latter group concerns, not an exercise of the Clause 14 power to govern the land and naval forces, but rather an exertion of the Clause 11 war power, as this Court long ago recognized.⁹

Moreover the cases relied on by the appellant all involved the trial of civilians who had some appreciable functional connection with the armed forces.¹⁰ A dependent wife has no such connection, and as late as June 1945, no dependent wife had ever been tried by an American court-martial; see the extensive compilation at 4 Bull. JAG 223-229 of the classes of civilians up to then subjected to military law. In 1947, The Judge Advocate General of the Army ruled that, as a matter of policy, dependent wives and children overseas would not be tried by court-martial. Aycok and Wurfel, *Military Law under the Uniform Code of Military Justice* (1955) 60. Not until 1950 was the luster of American arms

⁸ *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904; *Rubenstein v. Wilson*, 212 F. 2d 631 (D. C. Cir.); *Grewe v. France*, 75 F. Supp. 433 (E. D. Wis.).

⁹ See the early cases dealing with the power of the President as commander-in-chief to deal with occupied territory. *Cross v. Harrison*, 16 How. 164; *Leitensdorfer v. Webb*, 20 How. 176. Cf. *United States v. Rice*, 4 Wheat. 246 (British occupation of Maine in 1814). Similarly, *Madsen v. Kinsella*, 343 U. S. 341, is a war power case involving occupied territory and is therefore irrelevant to the present problem.

¹⁰ *Gerlach* (mate on Army transport); *Berue* (seaman on ship carrying supplies for Army); *Grewe* (mechanical engineer with Army engineers); *Mobley* (post exchange employee); *Rubenstein* (status unclear; remanded for more precise determination); *Perlstein* (air-conditioning mechanic ashore in connection with salvage operations in harbor). Significantly enough, in the *Perlstein* case, *supra* note 7, where the functional relationship was most tenuous, this Court granted certiorari and the writ was dismissed only because the case became moot.

tarnished by the court-martial of a dependent wife." And in the only case where the legality of such a performance after the cessation of military occupation has been sustained (*United States ex rel. Krueger v. Kinsella*, Jur. St. App. 4a-16a), an appeal has been perfected; it is now No. 7165 in the Fourth Circuit.

Appellant's assertion (Jur. St. 7) that appellee "was so intimately a part of the army overseas as to be subject to military jurisdiction in terms of American military law", does not rise above the level of rhetorical hyperbole. In actual fact, appellee, a dependent wife and the mother of two small children, was no more a part of the United States Air Force than if she had been quartered on any Air Force Base in the United States. And appellant's effort to fudge the constitutional issue through use of a figure of speech calls out for adherence to Mr. Justice Holmes' admonition: "As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no

¹¹ "In case number 340593 Audrey L. Aguaya, a dependent wife, was tried in Japan on 10 February 1950 on a charge of larceny, committed in December 1949. She was convicted and sentenced to six months confinement, which was suspended. In case number 351230, Fumie Okitsu Hilton, a dependent wife, was tried at Osaka, Japan, on 18 January 1952 for unlawful possession of drugs, an offense committed 11 December 1951. Upon conviction she was fined \$100, and sentenced to three months confinement, which was suspended." Respondent's reply brief in *United States ex rel. Krueger v. Kinsella*, H. C. No. 1726, S. D. W. Va., at p. 7.

Even casual reading between the lines strongly suggests that both trials were on an *in terrorem* basis. And since both took place while Japan was still occupied territory, there was undoubted military jurisdiction under AW 12 of 1948. Cf. *Madsen v. Kinsella*, 343 U. S. 341.

relation to the grounds on which the name was applied." *Guy v. Donald*, 203 U. S. 399, 406.

In the *Krueger* case, Jur. St. App. at 16a, the district court expressly rejected the Army's contention that a dependent wife accompanying the armed forces was a "part" thereof. The circumstance that the court there then went on to hold that the wife's trial by court-martial was authorized none the less, in the teeth of this Court's pronouncement that such jurisdiction is restricted "to persons who are actually members or part of the armed forces" (350 U. S. at 15), may well be ground for *per curiam* reversal; but assuredly it does not establish that, after *Toth*, there is any substantiality to the contention that civilians can be tried by court-martial in time of peace.

B. Even if it be assumed for purposes of argument that there was jurisdiction to try appellee by court-martial originally, such jurisdiction was lost after she was returned to the United States and ceased to be a person "accompanying the armed forces without the continental limits of the United States" within Article 2(11)

It is entirely possible to affirm the judgment below without ever reaching the constitutional issue.

Assuming *arguendo* that there was jurisdiction originally to try appellee under Article 2(11) as a person "accompanying the armed forces without the continental limits of the United States", that jurisdiction was lost after her judgment of conviction was set aside by the United States Court of Military Appeals on June 24, 1955, since at that point she was in the United States, in a civilian penal institution,¹²

¹² Whereas AW 2(e) of 1916 through 1948 purported to subject to military law "All persons under sentence adjudged by courts-martial", see *Kahn v. Anderson*, 255 U. S. 1, Article 2(7)

and was no longer accompanying the forces abroad. Hence by the summer of 1955, when it was determined to retry her by court-martial (Jur. St. 4-5), she was no longer within the terms of Article 2(11).

The authorities relied on by appellant to establish that the court-martial jurisdiction, here assumed for purposes of argument to exist, still continued, will not survive examination. For the most part, these hold that, once charges are duly preferred, expiration of the soldier's enlistment pending trial does not defeat the right to proceed.¹³ No one would dispute that proposition.¹⁴ But it is wholly otherwise where, by affirmative act of the Government, the soldier or officer against whom charges are pending is duly separated, discharged, or mustered out; in that event the military jurisdiction ceases, because after separation the individual is once more a civilian.¹⁵ And the same consequence follows where such separation takes place after he has been tried but before the proceedings have been approved.¹⁶

of the Uniform Code restricts military jurisdiction over prisoners to "All persons *in custody of the armed forces* serving a sentence imposed by a court-martial." [Italics added.] Appellant admits that, at all relevant times, after her original conviction, appellee has been in civilian custody. Jur. St. 4-5.

¹³ *Walker v. Morris*, 3 Am. Jurist 281 (Mass.); *In re Bird*, 2 Sawy. 33, Fed. Case No. 1428 (D. Ore.); *Barrett v. Hopkins*, 7 Fed. 312 (C. C. D. Kan.).

¹⁴ *Accord: Winthrop*, *118-120 [1920 reprint, pp. 90-91]; Rig. Op. JAG 1912, p. 511, ¶¶ VIII D 1, D 2; Dig. Op. JAG, 1912-1940, p. 164, last three subparagraphs of ¶ 359(6).

¹⁵ *Winthrop*, *116-118 [1920 reprint, p. 89]; Dig. Op. JAG, 1912, p. 514, ¶ VIII I 1; Dig. Op. JAG, 1912-1940, pp. 162-163, ¶¶ 359(1), 359(2).

¹⁶ 5 Bull. JAG 35, ¶ 359(6); 5 *id.* 278, ¶ 407(3).

Here it was the Government itself that, by its own affirmative acts, changed appellee's status from that of a person accompanying the armed forces overseas to that of a person in civilian custody in the United States. She did not escape,¹⁷ nor did she change from one status subject to military law to another similarly so subject.¹⁸ Indeed, in consequence of the explicit terms of Article 2(7), *supra* note 12, she ceased to be subject to military jurisdiction the moment she was placed in civilian custody at Alderson (Jur. St. 4).

Here the Air Force, by returning appellee to the United States and there placing her in civilian custody, just as effectively terminated its jurisdiction over her, once the original conviction was set aside, as if, she being a WAF, it had discharged her before the proceedings against her had been terminated. For the military rulings teach that an affirmative separation from the service at any stage in the course of the court-martial proceedings causes those proceedings to abate.¹⁹

On this footing, any jurisdiction that existed was lost, and, in view of *Toth v. Quarles*, 350 U. S. 11, cannot now be reasserted.

¹⁷ As in *United States ex rel. Mobley v. Handy*, *supra* note 8, cited at Jur. St. 15.

¹⁸ As in *Carter v. McClaughry*, 183 U. S. 365, and the *Perlstein* case, *supra* note 7, both cited at Jur. St. 15.

¹⁹ Authorities cited in notes 15 and 16, *supra* p. 13. It is significant in this connection that the end of a war has been held to destroy war-time jurisdiction to try camp-followers who committed offenses in time of war. Dig. Op. JAG 1912, p. 151, ¶ LXIII B 1.

C. The power of Congress to maintain relations with foreign countries is utterly irrelevant here

Apparently somewhat unsure of his contentions under the law military, appellant adds a long argument (Jur. St. 15-20) to the effect that the Air Force's right to try appellee by court-martial can be supported as an exercise of the power to treat with foreign countries. It would be interesting to join issue with the many questionable contentions there urged, but the temptation must be foregone: appellant's foreign relations argument is utterly irrelevant to the present case.

First. Appellant admits (Jur. St. 4) that it was proposed to retry appellee by a court-martial convened at Bolling Air Force Base, within the District of Columbia. Thus appellant's argument comes to this, that the trial of a civilian woman by a court-martial convened at the very seat of Government, only a few short miles away from the regularly constituted courts of the United States and literally within the shadow of the Capitol dome, can somehow be sustained as an exercise of the treaty power.

It would be interesting to know whether, in the 166 years since this Court first sat, it has ever been tendered, from any source, a suggestion more weird than this one.

Second. But examination of the authority principally relied on, the Act of Parliament known as the United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31 (Jur. St. App. 17a-27a), shows that nothing therein even purported to enlarge the jurisdiction of American courts-martial.

Sec. 2 (1) of that Act (Jur. St. App. 19a) provided that, for purposes thereof,

“all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces:
* * *”

In other words, the British law is that anyone who as a matter of American law is subject to American military jurisdiction is as a matter of British law likewise subject to American military jurisdiction.²⁰ This leaves entirely open the issue here, whether appellee as a matter of American law (including, obviously, American constitutional law) is subject to American military jurisdiction. Thus nothing in the cited Act of Parliament, and nothing in the exchange of notes preceding its passage—nor, for that matter, nothing else relied on by the appellant—adds anything

²⁰ With one exception, stated in the proviso to Section 2(1) immediately following the quotation in the text, viz., “Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom.” Otherwise stated, a British subject employed in the United Kingdom to work for the United States forces there could not be tried by an American court-martial even though literally within the then applicable portion of Article of War 2(d) of 1920, viz., “in time of war all * * * persons accompanying or serving with the armies of the United States in the field * * *” (41 Stat. at 787). (Inasmuch as the Act of Parliament in question was enacted while the United States was at war, the other portions of Article of War 2(d) were obviously irrelevant at that time.)

The opening clause of Article 2(11) of the Uniform Code of Military Justice, “Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law”, must therefore be read in the context of the foregoing restriction. So read, the clause is one of limitation, not, as appellant erroneously assumes (Jur. St. 17-19), one spelling out a source of power.

whatsoever to the scope of military jurisdiction under the American Constitution.

It is not necessary to speculate whether it is ever possible, by agreement with a foreign nation, to enlarge the categories of American citizens who may be tried by American courts-martial; it is sufficient to say that appellant has failed to point to any treaty or executive agreement which in this case purported to enlarge the grant of court-martial jurisdiction that is now narrowly circumscribed by Clause 14, Section 8, Article I, of the Constitution of the United States.

CONCLUSION

For the foregoing reasons, this appeal should be dismissed for want of jurisdiction. If, however, it is to be entertained, then the judgment below should be affirmed.

Respectfully submitted.

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FEBRUARY 1956.

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, SUPERINTENDENT OF THE DISTRICT
OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal from the United States District Court for the
District of Columbia.

BRIEF FOR THE APPELLEE

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GLOSSARY OF MILITARY LAW ABBREVIATIONS

AGN	Articles for the Government of the Navy (prior to 1951). R. S. § 1624; 34 U. S. C. [1946 ed.] § 1200.
AW	Articles of War for the year in question, as follows: 1775. Resolution of June 30, 1775, 2 J. Cont. Cong. 111. 1776. Resolution of Sept. 20, 1776, 5 J. Cont. Cong. 788. 1806. Act of April 10, 1806, c. 20, 2 Stat. 359. 1874. R. S. § 1342. 1916. Sec. 3 of the Act of Aug. 29, 1916, c. 418, 39 Stat. 619, 650. 1920. Ch. II of the Act of June 4, 1920, c. 227, 41 Stat. 759, 787; 10 U. S. C. [1926 through 1946 eds.] §§ 1471-1593. 1948. Title II of the Act of June 24, 1948, c. 625, 62 Stat. 604, 627; 10 U. S. C. [Supp. II to 1946 ed.] §§ 1471-1593.
BR	Holdings of Army Boards of Review, under AW 50½ of 1920. Multigraphed.
Bull. JAG	Bulletin of The Judge Advocate General of the Army, 1942 to 1951. A continuation of Supp. I to Dig. Op. JAG, 1912-1940, <i>infra</i> .
CMO	Court-Martial Orders, Navy Department.
CMR	Court-Martial Reports. A current series; Lawyers' Cooperative Publishing Co.
Dig. Op. JAG	Digest of Opinions of The Judge Advocate General of the Army. Published, <i>inter alia</i> , 1880, 1895, 1901, 1912, 1912-1940. Also Supp. I to the last, 1941.
MCM	Manual for Courts-Martial. Editions for the Army through 1928; for Army and Air Force in 1949; for all services in 1951.
UCMJ	Uniform Code of Military Justice. Act of May 5, 1950, c. 169, 64 Stat. 108; 50 U. S. C. §§ 551-736.
Winthrop	Winthrop, <i>Military Law and Precedents</i> (2d ed. 1896). References to original pagination are given as star pages [*]. References to "Reprint" are to the edition published by the War Department in 1920 "for the information of the service."

IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, SUPERINTENDENT OF THE DISTRICT
OF COLUMBIA JAIL, *Appellant*,

v.

CLARICE B. COVERT

On Appeal from the United States District Court for the
District of Columbia

BRIEF FOR THE APPELLEE

OPINION BELOW

The oral opinion of the district court (R. 131-132) is not reported.

JURISDICTION

The judgment of the district court (R. 134) was entered on November 22, 1955. The notice of appeal to this Court (R. 135-136) was filed on December 22, 1955. The jurisdiction of this Court is invoked under 28 U. S. C. § 1252.

On March 12, 1956, the Court ordered (R. 145) that "further consideration of the question of the jurisdiction of this Court and of the motion to dismiss or affirm is postponed to the hearing of the case on the merits."

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The constitutional provisions and statutes involved are set forth in the Appendix, *infra*, pp. 123-125.

QUESTIONS PRESENTED

1. Whether the Superintendent of the District of Columbia Jail, who is appointed and removed by the Commissioners of the District of Columbia, is an officer or employee of the United States or of any agency thereof within the meaning of 28 U. S. C. § 1252 so as to be able to appeal directly to this Court, he being the only official person who is a party to the proceeding.

2. Whether, assuming the constitutionality of Article 2(11) of the Uniform Code of Military Justice, a person subject thereto as one "accompanying the armed forces of the United States without the continental limits of the United States" ceases to be so subject when, by affirmative act of the Government, she is returned to the United States and there placed in civilian custody.

3. Whether a civilian woman, the dependent wife of a non-commissioned officer in the Air Force, may constitutionally be tried by court-martial in time of peace and not in occupied territory.

STATEMENT

This is a habeas corpus proceeding brought by a woman who all her life has been a civilian, challenging the right of the United States Air Force to try her by court-martial at Bolling Air Force Base within the District of Columbia.

The essential facts are not in dispute.

In March 1953, appellee was living in Upper Heyford, Oxfordshire, England, with her two children and her husband, Master Sergeant Edward E. Covert, USAF. Appellee and the two children had been furnished Government transportation to England as Sgt. Covert's dependents, and were living with him in England in quarters furnished by the Government (R. 1, 6-7).

On March 10, 1953, appellee was under psychiatric treatment by a medical officer of the United States Air Force (R. 1, 21-22, 66-67, 100-101). On the night of March 10/11, while emotionally disturbed, and in a condition that some of the medical witnesses considered to involve psychosis and legal irresponsibility, appellee killed her husband (R. 1, 23-28, 68-75, 84-90, 98, 101-105). She then climbed into bed with his corpse and stayed there all night (R. 1, 23, 82).

Thereafter, purporting to act under authority of Art. 2(11), UCMJ, the Commander of the 7th Air Division, USAF, caused appellee to be tried by a general court-martial of the U. S. Air Force convened at RAF Station Brize Norton, Oxfordshire, England, on a charge of premeditated murder in violation of Art. 18(1), UCMJ (R. 1-2, 5).

Faced with a certificate by an Air Force Colonel that appellee was subject to military law under the Uniform Code of Military Justice, issued pursuant to the British Act of Parliament known as the United States of America (Visiting Forces) Act, 1942 (U. S. Br. 74-78), the British authorities relinquished jurisdiction (R. 128-131). Appellee was accordingly tried by court-martial, and on May 29, 1953, was convicted of premeditated murder, and was sentenced to life imprisonment (R. 2, 5).

On June 23, 1953, appellee was flown, in the custody of the U. S. Air Force, to the Federal Reformatory for Women situated at Alderson, West Virginia, and was there confined as a prisoner by virtue of said conviction,

beginning June 25, 1953 (R. 2, 12). Appellee was with child during the trial (R. 20, 95), and the child was born while she was a prisoner at Alderson (R. 2, 95).

On February 19, 1954, an Air Force Board of Review, acting under Art. 66, UCMJ, affirmed appellee's conviction, one member dissenting, in opinions (R. 12-95) reported at 46 CMR 465. The case then reached the Court of Military Appeals, by certificate of the Judge Advocate General, USAF, under Art. 67(b)(2), UCMJ (R. 7, 97), and also by a petition for grant of review on other issues, filed by appellee's counsel (R. 7, 98).

On June 24, 1955, more than two years after appellee's trial, the Court of Military Appeals, one judge dissenting, reversed the conviction in opinions (R. 97-121) reported at 6 USCMA 48 and 19 CMR 174. The basis of reversal was that two of the prosecution's expert witnesses, who had indicated in unsolicited post-trial affidavits that they had been hampered by an Air Force Manual in expressing their professional opinions (R. 142-145), had in fact applied that Manual too restrictively (R. 107-110). The Court of Military Appeals accordingly remanded the case "for rehearing or other action not inconsistent with this opinion" (R. 110, 95-96).

Thereafter, the Judge Advocate General, USAF, transmitted the record of trial and the Court of Military Appeals decision to the Commander, Headquarters Command, Bolling Air Force Base, Washington, D. C., "to order a rehearing if a rehearing is practicable", and on July 12, 1955, the latter officer ordered such a rehearing, i.e., a new trial pursuant to Art. 63, UCMJ (R. 8, 121-122).¹

¹ It was alleged in par. 9 of the petition for habeas corpus (R. 2), on the basis of a letter in counsel's possession, that the determination to retry appellee by court-martial was personally made on July 20 by former Air Force Secretary Harold E. Talbott. But, as counsel remarked at the hearing in the District Court after being served with appellant's return, "A number of underlings claim that honor." Tr. 4 (not printed).

Following this, on July 14, 1955, appellee was released from the Reformatory at Alderson, West Virginia, and was taken, in Air Force custody, to the District of Columbia Jail (R. 2, 8-9, 123). At her counsel's request, she was then transferred to St. Elizabeth's Hospital for observation (R. 2, 9, 124-128). Later, on September 23, 1955, she was returned to appellant's custody at the District of Columbia Jail (R. 2).

Appellee's second trial by court-martial, at Bolling Air Force Base, was scheduled for November 28, 1955 (R. 2, 8).

The present petition for habeas corpus (R. 1-4) was filed on November 17, and an order to show cause issued on the same day (R. 4-5). Appellant made return (R. 5-11), setting forth the entire military proceedings, including the transcript of trial by court-martial; the complete military record is now before this Court.²

After a hearing, Judge Tamm delivered his opinion from the bench (R. 131-132), holding appellee entitled to release, essentially on the basis that (R. 132) "a civilian is entitled to a civilian trial". He accordingly signed a judgment on November 22, 1955, releasing appellee on an appeal bond in the sum of \$1000 (R. 134; see colloquy as to the amount of the bond at R. 133-134).

From that judgment, appellant took a timely appeal to this Court, citing 28 U. S. C. § 1252 (R. 135-136).³ Appellee moved to dismiss or affirm. Consideration of that motion and the question of this Court's jurisdiction was, by order entered March 12, 1956, postponed to the hearing on the merits (R. 145).

² Printed in part at R. 12-131, together with the stipulated addition to the record (R. 136-145), which contains the three post-trial affidavits considered by the Board of Review and the Court of Military Appeals.

³ As appellant says, he had earlier taken an appeal to the United States Court of Appeals for the District of Columbia Circuit (U. S. Br. 27; n. 11). The effect of the last sentence of 28 U. S. C. § 1252 on the earlier appeal is discussed *infra*, p. 21, note 8.

SUMMARY OF ARGUMENT

I. The present appeal must be dismissed because appellant is not an officer or employee of the United States or of any of its agencies and therefore is not within the terms of 28 U. S. C. § 1252.

A. Appellant is an officer of the District of Columbia and not an officer of the United States. That distinction has been recognized by the courts, by the Government's law and accounting officers, and, preeminently, by the Congress, which in many sections of the United States Code has referred to both groups, thus indicating its settled conviction that the two categories are so far distinct as always to require separate mention.

B. Whatever may be its status in the law of municipal corporations, the definition of "agency" in 28 U. S. C. § 541 shows that the District of Columbia is not an "agency" of the United States for purposes of Title 28, U. S. C. This conclusion is fortified by other provisions of that Title which would be meaningless on any contrary assumption.

C. Granted that appellant is an agent of the United States for custodial purposes, so as to be able to bind the United States by any judgment entered against him, he still does not come within § 1252. Had Congress desired to include any agent of the United States in § 1252, it would have used apt language to that end, as it did in 28 U. S. C. § 1442(a)(1).

D. Other means were available to the United States to obtain prompt review here. It could have intervened in the district court and become a party. Alternatively, appellant could have appealed to the Court of Appeals and then sought certiorari before judgment there.

II. Assuming that the appeal lies, and assuming the constitutionality of Art. 2(11) insofar as it subjects to military law persons "accompanying the armed forces without the continental limits of the United States", such military

jurisdiction was lost when the Air Force returned appellee to the United States.

A. While military jurisdiction once attached through the service of charges survives the expiration of a soldier's enlistment or of an officer's tour of duty, any affirmative act of separation, by discharge or release to inactive status, even during the pendency of court-martial proceedings, destroys that jurisdiction, since it transfers the accused back to civilian status. The Air Force has recognized this elsewhere. Here jurisdiction over appellee was terminated on two grounds.

B. First, upon being placed in custody other than that of the armed forces, she was no longer subject to the Code. Arts. 2(7), 58(a), UCMJ. Whatever may be the status of discharged soldiers in military custody, the scheme of the Uniform Code makes it clear that, once a person without military status is placed in civilian custody, military jurisdiction ceases.

C. Since the Art. 2(11) jurisdiction is geographical, it follows that the Air Force's act in returning appellee to the United States destroyed the jurisdiction to retry her once her original conviction was set aside. This conclusion is in accord with older military rulings on the termination of a military jurisdiction limited in time or status.

III. A. *Toth v. Quarles*, 350 U. S. 11, simply reaffirms the traditionally accepted unconstitutionality of any legislative attempts to subject civilians to court-martial jurisdiction in time of peace. This was proclaimed by Winthrop, and by successive Judge Advocates General of the Army over a forty-year period, from 1866 through 1905 and 1906. Those authorities cannot fairly be charged with libertarianism, with lack of martial ardor, or with less than full devotion to the needs of the armed forces. Other military writers after the Spanish War shared those views.

B. Prior to 1916, American military jurisdiction over camp followers was always limited to those civilians who,

in time of war, accompanied the armies in the field. Moreover, the exercise of that jurisdiction was always strictly limited. Even close and direct functional connection with the Army made no difference; the post trader, who followed the sutler and preceded the post exchange, was held not amenable to trial by court-martial in time of peace. After the jurisdiction was extended, on the books in 1916 and in practice in 1941, the only cases coming before the civil courts did not, prior to the rulings presently under review, deal with the question now presented; they involved only cases of camp followers in war time, or in occupied territory where the war power was being exerted. The traditional jurisdiction that subjects to trial by court-martial civilians who accompany the armies in the field in time of war now set forth in Art. 2(10), UCMJ, is ample to the needs of the service and moreover conforms both to historical precedent and to constitutional limits.

C. In 1916 and again in 1950, when Congress extended court-martial jurisdiction to cover civilians accompanying the armed forces overseas in time of peace, it was not advised of the earlier rulings; no one even suggested a constitutional question; and the considerations now advanced, based on world events and American military commitments, were, as the legislative history on both occasions demonstrates, not articulated by anyone.

D. Except in a purely rhetorical sense, dependent wives are no more a "part" of the armed forces abroad than they are in the United States. For 175 years, from 1775 to 1950, no dependent wife was ever placed on trial before an American court-martial. The dictum in *Madsen v. Kinsella*, 343 U. S. 341, is valueless as a precedent since the camp-follower issue was not contested there. Since even functional connection with the forces is insufficient to establish military jurisdiction, as the instances of contractors and post traders show, plainly there can be no military jurisdiction over dependent wives. They are simply not a "part" of the forces, regardless of what military

emoluments and amenities they enjoy; their relationship to the forces abroad does not differ in that or in any other respect from their relationship to the forces at home. Precedent and logic alike join in denying that marriage to a soldier makes a woman a "part" of the Army.

E. The power to try civilians by court-martial in occupied territory rests on the war power and on a statute giving general courts-martial the powers of military government tribunals, and so cannot justify such trials in non-occupied territory.

Even in domestic territory, the war power is "a power to wage war successfully", and so it justifies acts at home that could not possibly have been valid in time of peace.

The war power is also the source of the authority to deal with occupied territory; the United States is in such territory by right of conquest, and not, as in this case, with another nation's consent. Moreover, when the United States occupies enemy territory, Americans with property there are not entitled to compensation for its seizure, and are moreover subject to non-jury trial by the tribunals of American military government, which are enforcing foreign law.

Since 1916, a general court-martial has had all the powers of a military government court when it sits in occupied territory; this is the provision underlying the dictum in *Madsen v. Kinsella*, 343 U. S. 341, which asserts the concurrent jurisdiction of courts-martial. The military trial of civilians in occupied territory is thus an exercise of the war power, not of the power to govern the armed forces. The latter power can be exerted anywhere and at any time—provided its exercise is limited to the armed forces.

F. Nothing in the Fifth Amendment enlarges the grant of power to govern the armed forces. It was long thought that the Amendment was a source of military jurisdiction over non-military persons, and that the only inquiry was

whether a particular case was one "arising in the land and naval forces." But this easy assumption was exploded by *Toth v. Quarles*, 350 U. S. 11, 14. It is plain that nothing in the first ten Amendments could possibly be a grant of power. And independent research into the history of the Bill of Rights confirms the correctness of this Court's interpretation in *Toth*.

G. The power to govern the armed forces does not become broader simply because exercised outside the three-mile limit. Whether *Ex re Ross*, 140 U. S. 453, which stated in 1891 that the Constitution did not operate abroad, and which upheld a non-jury trial by a consular court in the Orient, is still law today, presents an interesting question. The trend since then has been markedly in favor of extending both constitutional guarantees as well as constitutional powers. It would seem that, if constitutional grants of power are deemed available for export, the Bill of Rights should not and does not stop at the water's edge.

But decision on this point is not necessary, for the reason that appellee was not tried by a consular court. She was tried by court-martial, which draws its jurisdiction from the power to govern and regulate the armed forces. That power does not cover dependent wives in time of peace. It is therefore not enlarged because sought to be exercised outside the continental limits of the United States.

H. Disciplinary considerations underlying the court-martial power do not extend to dependent wives, as 175 years of history demonstrate. And the arguments based on foreign relations, now advanced to subject wives to trial by court-martial, simply do not square with the facts.

The United States now has overseas many thousands of civilian employees of agencies other than the Department of Defense, and those employees are likewise accompanied by dependents. If the maintenance of international harmony justifies subjecting Department of Defense civil-

ians and dependents to military trials, why not those others too? They stand on the same footing so far as potential international friction is concerned.

If dependent wives are subject to military trial, then so are dependent children—but the Uniform Code lays down no test for the criminal amenability of dependent children.

Finally, the problem of offenses committed by accompanying civilians is a very small one. Such cases make up less than one half of one per cent of the Court of Military Appeals' business. And only six civilians—two of whose cases are now before this Court—have ever been convicted by court-martial of offenses serious enough to warrant their incarceration in federal civilian penal institutions.

The result is that, howsoever the problem is approached, the power to make rules for the government and regulation of the land and naval forces is not a power to govern or regulate the wives of members of those forces.

IV. The treaty power is completely irrelevant in the present case.

A. The invocation of the treaty power is an afterthought. That argument is not raised by the pleadings. The legislative history of Art. 2(11) establishes that Congress proceeded on the basis that it was reenacting existing military law in slightly different and more generalized form, and that it added the "Subject to" clause in order to avoid possible interference with the territorial jurisdiction of other countries. That clause, plainly, is one of limitation; it is not, and was not intended as, a grant of power. And the practice under Art. 2(11) shows that the jurisdiction thereunder has been exercised without reference to the terms of agreements with other nations.

B. The text of Section 2(1) of the British Parliament's United States of America (Visiting Forces) Act, 1942, shows that it did not purport to enlarge the jurisdiction of

American courts-martial, but in fact contracted it, so as to exclude British subjects who would otherwise literally fall within the terms of AW 2(d). The "Subject to" clause of Art. 2(11), UCMJ, reflects and accepts this contraction.

C. Even on the assumption *arguendo* that more can be drawn from the British statute than appears in its text, appellant still fails, since no exercise of the treaty power could possibly authorize the trial of this civilian appellee by court-martial within the District of Columbia. For the treaty power, "like every other governmental power, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 320.

V. To the extent that appellant's invocation of the Necessary and Proper Clause brings the matter into the realm of judgment, examination of the realities of trial by court-martial demonstrates that the principle of "the least possible power adequate to the end proposed" is one preeminently applicable to the scope of military jurisdiction.

A. There is no need in fact to try dependent wives by court-martial in time of peace, as 175 years of experience show. To the extent that American civilian employees and dependents abroad commit offenses against foreign nationals, they are now triable in foreign courts. The actual figures show that the number of serious offenses committed by such civilians against Americans is very small, and for those few instances Congress can provide for trial in United States district courts. Principle and experience combine to establish the practicability of such a proposal; considerations of expense are of course inadmissible where the protection of constitutional rights is at stake.

B. Subjecting civilians to military jurisdiction in time of peace not only deprives them of their right to trial by jury, but necessarily cuts off other constitutional protections. They have no right to bail at military law, and decisions of the Court of Military Appeals reflect, by com-

parison with the standards applied in Article III courts, a substantial dilution of Fourth, Fifth, and Sixth Amendment protections.

C. The reasons that justify curtailment of individual rights of servicemen on the basis of fundamental distinctions between a military and a civilian society are wholly inapplicable to civilians who accompany the armed forces overseas in time of peace. Factors that justify restraints and restrictions to "govern armies of strong men" simply can not support similar treatment of dependent wives.

D. Even with the ameliorations introduced under the Uniform Code of Military Justice, military law, in actual practice, is still an essentially rough-hewn system, as a review of decisions of the Court of Military Appeals demonstrates. Examination of the conditions disclosed by those decisions shows that there are no persuasive reasons for subjecting to that system civilian women who happen to be married to servicemen.

E. The record of trial in the present case bears eloquent witness against the extension of military jurisdiction over civilian dependents. The wooden refusal of the Board of Review to give any weight to the recantation of the prosecution's expert witnesses, the way in which those witnesses' professional opinions were affected by a service manual, and, above all, the savage sentence imposed on a distraught and emotionally disturbed woman, so disproportionate when compared with sentences adjudged for the converse situation of unquestionably sane airmen killing a civilian, all emphasize the utter inappropriateness of turning over to an armed force the dispensing of justice to unarmed women.

The field of court-martial jurisdiction is accordingly preeminently one that calls for application of the principle of limitation to "*the least possible power adequate to the end proposed.*" *Anderson v. Dunn*, 6 Wheat. 204, 231; *Toth v. Quarles*, 350 U. S. 11, 23; *Cammie v. United States*, 350 U. S. 399, 404.

ARGUMENT

Mindful of Rule 16(4), appellee addresses herself at the outset to the question of this Court's jurisdiction to entertain the present appeal (R. 145).

I. THE PRESENT APPEAL MUST BE DISMISSED FOR LACK OF JURISDICTION, BECAUSE APPELLANT IS NOT AN OFFICER OR EMPLOYEE OF THE UNITED STATES OR ANY OF ITS AGENCIES, AND THEREFORE DOES NOT COME WITHIN 28 U. S. C. § 1252.

The Court has no jurisdiction of this appeal for the reason that appellant is only an officer or employee of the District of Columbia, and consequently does not come within the requirement of 28 U.S.C. § 1252, viz., in order to authorize a direct appeal thereunder, it is necessary that "the United States or any of its agencies, or any officer or employee thereof" be a party to the cause.

There is no question concerning the other requirements of § 1252—this is a civil action, being a habeas corpus proceeding; and Art. 2(11), UCMJ, was held unconstitutional by the district court, certainly as applied to this appellee. The sole inquiry is whether appellant falls within the quoted portion of § 1252.

A. Appellant is an Officer of the District of Columbia and Not an Officer of the United States

As the caption of this case shows, appellant is Superintendent of the District of Columbia Jail. The holder of that office was formerly appointed and removed by the Commissioners of the District upon recommendation of the Board of Public Welfare (D. C. Code [1951 ed.] §§ 24-409, 24-411), but, since the reorganization of the District of Columbia Government, he is now subject to the supervision of the Director of the Department of Corrections, who in turn is appointed by the Commissioners. See Reorganization Order No. 34, Appendix to Title 1 of Supp. III to D. C. Code, 1951 ed., p. 34.

It follows that appellant as Superintendent of the District of Columbia Jail is an officer of the District of Columbia and not an officer of the United States.

That distinction, which stems from the lack of identity between the United States and the municipal corporation known as the District of Columbia, the latter enjoying none of the general government's immunities (*Barnes v. District of Columbia*, 91 U. S. 540; *Metropolitan R. Co. v. District of Columbia*, 132 U. S. 1; *District of Columbia v. Woodbury*, 136 U. S. 450), has been recognized in a great variety of situations.

Thus, the courts have held that officers of the District of Columbia are not officers of the United States. *Griffith v. Rudolph*, 54 App. D. C. 350, 298 Fed. 672; *Donovan v. United States*, 21 C. Cls. 120; *Bundy v. United States*, 21 C. Cls. 429.

So have the Government's law and accounting officers. 29 Op. Atty. Gen. 410; 22 Op. Atty. Gen. 59; 13 Comp. Dec. 262; 13 Comp. Dec. 533.

And, preeminently, the Congress, in many, many sections of the United States Code, has, by referring to both officers and employees of the United States and to those of the District of Columbia in the same clause, indicated its settled conviction that the two groups are wholly distinct and therefore require separate mention. The listing that follows must be regarded as representative rather than exhaustive: Title 5, §§ 17b, 30n, 59a, 61a-1(a), 61g, 83, 84a, 794, 901(a), 914, 942(b), 942b, 944, 955, 958, 2061(a); Title 10, §§ 371, 371a; Title 14, § 761; Title 26, §§ 3401(c), 3404, 4772(b); Title 28, § 1823(b); Title 32, §§ 75, 76; Title 50 Appendix, §§ 45⁹(b)(A), 1472(a)(A), 1474.⁴

Appellant simply cannot qualify as an officer or employee of the United States.

⁴ The reference in each instance is to the Code provision as amended through the close of the 1st Session of the 84th Congress.

B. The District of Columbia is Not an Agency of the United States for Purposes of Title 28, U. S. Code .

Appellant next argues (U.S. Br. 15-20) that, conceding the District of Columbia to be a distinct municipal corporation, it is none the less an "agency" of the United States.

True, for many purposes, and in a broad sense, every municipal corporation is an agency of the higher sovereignty by which it was created. E.g., *Trenton v. New Jersey*, 262 U.S. 182. And, as in the Legislative Reorganization Act of 1949 (5 U.S.C. § 133z-5), Congress may, by express definition, treat the District of Columbia as a federal "agency." But the question here cannot be disposed of by generalization or by resort to inapplicable statutory definitions.

The term "agency" is expressly defined, for purposes of Title 28 of the United States Code, so as to exclude the District of Columbia.

Section 451 of Title 28 provides in pertinent part:

"As used in this title: * * *

"The term 'agency' includes any department, independent establishment, commission, administration, authority, board or bureau of the United States or any corporation in which the United States has a proprietary interest, unless the context shows that such term was intended to be used in a more limited sense."

It would be difficult to conceive of a more comprehensive definition that so very plainly excludes the District of Columbia. And so it has been held that the District of Columbia does not qualify as a "federal agency" under the Tort Claims Act, which is a part of Title 28 (28 U.S.C. §§ 2671 et seq.). *Douffas v. Johnson*, 83 F. Supp. 644 (D.D.C.).

Appellant cites 18 U.S.C. § 6, defining "agency" just as 28 U.S.C. § 451 does, and relies on *United States v. Bramblett*, 348 U.S. 503, which interpreted the former provision in broad terms (U.S. Br. 17-18).

It is of course true, as the revisers' notes to 28 U.S.C. § 451 show, that its definition of "agency" was intended to conform to the same definition contained in 18 U.S.C. § 6. But the *Bramblett* case affords appellant no help here, for the obvious reason that the Court was not there concerned with the status of the District of Columbia. What was said in *Armour & Co. v. Wantock*, 323 U.S. 126, 132-133, apparently still needs periodic repetition: "It is timely again to remind counsel that words of our opinions are to be read in the light of the facts of the case under discussion."

Other statutory provisions fortify the conclusion that the District of Columbia is not an agency of the United States for purposes of Title 28.

Thus, 28 U.S.C. § 1825 provides that fees and mileage need not be tendered to a witness upon service of a subpoena "issued in behalf of the United States or an officer or agency thereof." But 11 D. C. Code § 1521 provides that the disbursing officer of the District of Columbia may advance sums to be used for the payment of witness fees. If the District of Columbia were an agency of the United States, there would obviously be no need to provide for advancing witness fees.⁵

And 28 U.S.C. § 1823(b) provides that "Employees of the United States or an agency thereof in active service called as witnesses on behalf of the District of Columbia in any judicial proceeding in which the government of the District of Columbia is a party" shall not be paid witness fees. If, as appellant argues, the District of Columbia is an agency of the United States within Title 28 U.S.C., the quoted language would be redundant nonsense.

⁵ It should be noted that the D. C. Code provision referred to survived the complete integration of the superior courts of the District of Columbia into the federal judicial system that was effected by Sections 135-142 of the Act of May 24, 1949, c. 139, 63 Stat. 89, 108-110, that swept away so many differentiations formerly peculiar to the District of Columbia.

C. The Circumstance That Appellant Was an Agent of the United States in the Present Case Does Not Bring Him Within 28 U. S. C. § 1252

Appellant argues at some length (U.S. Br. 20-26) that he was an agent of the United States in his capacity as Superintendent of the District of Columbia Jail.

It is not disputed that appellant is "a custodial agent of the United States" (U.S. Br. 20), or that he was an "agent of the United States in respect to [appellee's] safe keeping" (U.S. Br. 23), or that he was the "keeper of the United States" (U.S. Br. 24), or that he was "an agent for the Air Force" (U.S. Br. 25).

But these concessions still do not bring appellant within 28 U.S.C. § 1252. That section does not mention agents or keepers; it speaks only of "any officer or employee." However much appellant may be acting on behalf of the United States for custodial purposes, he simply does not qualify under the statutory language so as to be able to prosecute a direct appeal of this Court.

If Congress had desired to include within § 1252 any person who was merely an agent of the United States, without being either an officer or employee thereof, it could—and undoubtedly would—have used apt language to that effect.

Thus in 28 U.S.C. § 1442(a)(1), the provision for removal of state criminal prosecutions covers "Any officer of the United States or any agency thereof, *or person acting under him* * * * ." [Italics added.] See *People of State of Colorado v. Mayrell*, 125 F. Supp. 18 (D. Colo.), motion for leave to file petition for prohibition or mandamus denied, *sub nom. State of Colorado v. Knows*, 348 U. S. 941.

Undoubtedly, appellant in this case is a "person acting under" the officers of the Air Force who desired him to confine appellee (R. 123). Appellant may, for many purposes—though hardly in this case—be acting as an agent

of the Attorney General. But the question here concerns not § 1442(a)(1) but § 1252, and the latter provision does not contain the "person acting under" clause.

Nor does it follow, as appellant now urges (U. S. Br. 26), that unless he is held to be within the statute "it would appear difficult to find a basis for holding the United States or any of its officers bound by the decision below."

As the cases cited by appellant show (U. S. Br. 24-25), he was "the keeper of the United States." That is sufficient to bind the United States. Appellant can still be an agent of the United States, capable of binding the United States, even though he is not entitled to take a direct appeal under 28 U.S.C. § 1252.

Thus, *Gillies*, of *Von Moltke v. Gillies*, 332 U. S. 708, though only a state official—he was Superintendent of the Detroit House of Correction—was an agent of, and the keeper of, the United States; acting under the direction of the Attorney General. But those facts could not bring him within the terms of a precisely and rather narrowly drawn jurisdictional provision. If, on Mrs. Von Moltke's petition for habeas corpus, the statute under which she was being held had been declared unconstitutional, it is plain that *Gillies*, although undoubtedly an agent of the United States, could not have qualified under § 1252 so as to be able to prosecute a direct appeal.

D. Other Means Were Open to Appellant to Obtain Prompt Review of the Constitutional Issues Involved in This Case

Appellant argues (U. S. Br. 15) that the manifest purpose of 28 F.S.C. § 1252 and of its predecessor provision (Sec. 2 of the Act of August 24, 1937, c. 754, 50 Stat. 751, 752) was "to afford the United States Government as a whole an opportunity for prompt review of constitutional issues".

No one old enough to have lived through the constitutional crisis of the mid-1930s will ever dispute that. But

the statute invoked, and the law now in force, make ample provision for such prompt review.

First: To preclude the possibility of significant constitutional litigation to which the United States will not be a party, Congress provided, in 28 U.S.C. § 2403, for the United States' right of intervention, so as to confer upon it all the rights of a party to the cause. This provision, drawn from Sec. 1 of the same Act of August 24, 1937, seems to have been primarily occasioned—if one can properly point to a single incident—by the notorious and essentially collusive case of *Lyric American States Public Service Co.*, 12 F. Supp. 667 (D. Md.), affirmed *sub nom. Burco, Inc. v. Whitworth*, 81 F. 2d 721 (C.A. 4); certiorari denied, 297 U. S. 724.⁶ But in the present litigation, the United States did not choose to intervene, although appellant was represented by the United States Attorney below (R. 11, 136).

Second. Even without intervention by the United States, there was available to appellant a swifter method for obtaining prompt review of the obviously important constitutional question involved in this case: He could have perfected the appeal he had earlier taken to the Court of Appeals (U. S. Br. 27, n. 11), and then filed, prior to judgment, a petition for writ of certiorari here,⁷ 28 U.S.C. § 1254(1); this Court's Rule 20. That was the course successfully pursued by the petitioner in No. 713, *Kissella, Warden, etc. v. Krueger*,⁷ where, moreover, the warden had been the prevailing party in the district court.

Adequate remedies having been available to obtain more timely review, considerations based on the desirability of such quicker review cannot properly be invoked to torture the plain language of 28 U.S.C. § 1252.

⁶ For a contemporaneous account of the history of the 1937 Act, see Frankfurter and Fisher, *The Business of the Supreme Court at the October Terms, 1935 and 1936*, 51 Harv. L. Rev. 577, 610 *et seq.*

⁷ Petition for certiorari filed February 27, 1956, and granted March 12, 1956.

It follows from what has been said under the present heading that this appeal must be dismissed for want of jurisdiction.*

The remaining portions of the brief deal with the merits on the assumption, made for purposes of argument, that the present appeal lies.

- **II. ASSUMING THAT APPELLEE COULD CONSTITUTIONALLY HAVE BEEN TRIED BY COURT-MARTIAL IN ENGLAND AS A PERSON "ACCOMPANYING THE ARMED FORCES OF THE UNITED STATES WITHOUT THE CONTINENTAL LIMITS OF THE UNITED STATES," SHE CEASED TO BE SUBJECT TO THE UNIFORM CODE OF MILITARY JUSTICE AFTER THE AIR FORCE RETURNED HER TO THE UNITED STATES AND PLACED HER IN CIVILIAN CUSTODY, AND CONSEQUENTLY SHE COULD NOT THEREAFTER BE RETRIED BY COURT-MARTIAL.**

Inasmuch as appellee may rely on any ground disclosed by the record to support her judgment, whether or not those grounds were accepted by the court below (e.g.,

* Appellant's comments (U. S. Br. 27, n. 11) on his earlier appeal to the United States Court of Appeals for the District of Columbia Circuit should be brought up to date; on April 12, 1956, that court granted his motion for an extension of time.

Appellee respectfully submits that this action disregarded the relevant last paragraph of 28 U. S. C. § 1252, *infra*, p. 124, which reads:

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. *All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court.*" [Italics added.]

It was on the basis of the italicized sentence—nowhere referred to by appellant—that appellee contended, properly it is submitted, that there was nothing before the Court of Appeals, and that the statute precluded her simultaneous harassment by two appeals in two different courts.

Appellant's further suggestion (U. S. Br. 27, n. 11) that, having mistaken his remedy, the Court should now treat his Statement as to Jurisdiction herein as a Petition for Certiorari, overlooks the circumstance that 28 U. S. C. § 2103 applies only to appeals from state courts, and consequently does not permit such a course here.

Ex parte v. Scofield, 308 U. S. 415; *Morley Construction Co. v. Maryland Casualty Co.*, 300 U. S. 185), and because this Court will, as a matter of traditional practice, refrain from deciding constitutional questions when the record discloses other grounds of decision (e.g., *Neese v. Southern Railway Co.*, 350 U. S. 77), appellee turns at the outset of her discussion of the merits to the non-constitutional ground in the case, which was duly put forth in her petition for habeas corpus (§ 12a, R. 2-3). As there stated,

"If it be assumed that Art. 2(11), UCMJ, ever validly conferred jurisdiction on the United States Air Force to try relator as a person 'accompanying the armed forces without the continental limits of the United States,' then such jurisdiction terminated after relator's conviction was set aside, and she was held within the continental limits of the United States, not in the custody of the armed forces, but in three separate civilian institutions * * *."

A. While Military Jurisdiction Once Attaching Survives Expiration of a Term of Enlistment or of a Tour of Active Duty, It Is Destroyed When the Government by Affirmative Act Discharges or Separates the Individual Concerned

It cannot be doubted that, when military jurisdiction attaches, through the preferring of charges, such jurisdiction is not lost because, pending trial or in the course of the proceedings, the soldier's term of enlistment expires. *Walker v. Morris*, 3 Am. Jurist 281 (Mass.); *In re Bird*, 2 Sawy. 33, Fed. Case No. 1428 (D. Ore.); *Barrett v. Hopkins*, 7 Fed. 312 (C.C.D. Kan.); Winthrop, *118-120 (reprint, pp. 90-91); Dig. Op. JAG, 1912, p. 511, ¶¶ VIII D 1, D 2.

Similarly, where jurisdiction has attached in the case of an officer, it will not be defeated by the expiration of his tour of duty (Dig. Op. JAG, 1912-1940, p. 164, last three subparagraphs of ¶ 359(6)) or by the termination of his commission by operation of law (*United States v. Sipel*, 4 USCMA 50; 15 CMR 50).

But the situation is wholly different where, by affirmative act of the Government, the soldier or officer, against whom charges are pending is duly separated, discharged, or mustered out; in that event the military jurisdiction ceases, because after separation the individual is once more a civilian. Winthrop, *116-118 (reprint, p. 89); Dig. Op. JAG, 1912, p. 514, ¶ VII 1 1; Dig. Op. JAG, 1912-1940, pp. 162-163, ¶ ¶ 359(1), 359(2). And the same consequence follows where such separation takes place after he has been tried but before the proceedings have been approved. 5 Bull. JAG 35, ¶ 359(6); 5 Bull. JAG 278, ¶ 407(3).

As Winthrop put it (*118; reprint, p. 89), "the general rule is that *military persons*—officers and enlisted men—are subject to the military jurisdiction, so long only as they remain such; that when, in any of the recognized legal modes of separation from the service, they cease to be military and become *civil persons*, such jurisdiction can, constitutionally, no more be exercised over them than it could before they originally entered the army, or than it can over any other members of the civil community."

And, collecting rulings over a long period, the 1912 Digest of Opinions of The Judge Advocate General of the Army stated (p. 514, ¶ VII 1 1):

"An officer or soldier * * * ceases to be amenable to the military jurisdiction, for offenses committed while in the military service, after he has been separated therefrom by resignation, dismissal, being dropped for desertion, muster out, discharge, etc., and has thus become a civilian."⁹

This principle was applied in cases involving separations after both World War I (Dig. Op. JAG, 1912-1940, pp.

⁹ The original text notes an exception with respect to the recapture clause of AW 60 of 1874 (identical with that in AW 94 of 1916 through 1948 and in AGN 14 (Eleventh); narrower in scope of offenses covered than Art. 3(a), UCMJ, but identical in substance). In view of the holding in *Toth v. Quarles*, 350 U. S. 11, that qualification is of course no longer valid.

162-163, ¶¶359(1), 359(2)) and World War II (5 Bull. JAG 35; ¶359(6); 5 Bull. JAG 278, ¶407(3)).

In 1946, The Judge Advocate General ruled (5 Bull. JAG 35, *supra*) that "court-martial jurisdiction ceases over military personnel upon honorable discharge or upon transfer to reserve components.¹⁰ In the case of officers of the Army of the United States, such jurisdiction ceases upon their being placed on an inactive status. The mere preparation of charges against an officer of the Army of the United States prior to his being placed on inactive status would not be sufficient to continue court-martial jurisdiction over him as to the offenses therein charged."

And in the case of *United States v. Lt. Murray*, 62 BR 35; 5 Bull. JAG 278, ¶407(3),¹¹ where the accused, following his trial and sentence to dismissal but prior to confirmation of such sentence, was released from active duty and separated from the service, The Judge Advocate General advised the Under Secretary of War that the proceedings must be treated as abated. He said (62 BR at 39 [Oct. 14, 1946]):

"The Board [of Review] expresses the opinion that the release of accused from active duty effected constructive or implied remission of the sentence previously adjudged and that the sentence may not now be legally carried into execution. I concur in that opinion and recommend that the proceedings be treated as having been abated and that no further action be taken by way of exercise of the confirming power or publication of the proceedings in a general court-martial order."

The foregoing rulings, although duly cited in appellee's Motion to Dismiss &c. at p. 13, are neither referred to nor

¹⁰ With a stated exception as to AW 94; see comment in the preceding note.

¹¹ This case was traced to the Board of Review opinions through its court-martial number; the digested holding in 5 Bull. JAG 278 does not appear to be wholly complete.

answered by anything in appellant's brief. Appellee's view that they are unanswerable is confirmed by the circumstance that the Air Force was fully aware of those rulings, and, except in the present case, governed itself accordingly; this is graphically demonstrated by the case of *United States v. Sippl*, 4 USCMA 50, 15 CMR 50.

There an officer's conviction and sentence to dismissal had been affirmed by a Board of Review. Later, pending action by the Court of Military Appeals on his petition for grant of review, his commission expired by operation of law at midnight, April 1, 1953. The accused was advised that his pay would stop after that day and that he would have no duty assignment, but (p. 53) "that no written orders of separation, discharge, or release from active duty would be issued to him." When he protested, asserting that this was an attempt to effect a premature forfeiture of pay and allowances, he was advised (*id.*) "that an order relieving an officer from active duty is an administrative act which terminates the active duty status of an individual; and that such an order was not issued to the accused, nor to others in similar circumstances, because it was believed that any affirmative administrative actions might abate the proceedings pending against them."

Thus the Air Force did not suppose that "its intent and purpose to continue to assert jurisdiction" (U. S. Br. 72) would be proof against an affirmative act of separation on its part. For, plainly, under the ruling in Lt. Murray's case (*supra*, p. 24), and under the consistent course of military decision, any affirmative act by the Air Force would have destroyed jurisdiction to proceed further in Col. Sippl's case.

It follows that the language found in some of the expiration of enlistment cases (e.g., *Barrett v. Hopkins*, *supra*, 7 Fed. at 315, cited at U. S. Br. 66), to the effect that juris-

diction cannot be divested "by any subsequent change in the status of the accused," is far too broad.¹²

Where the apparent change of status is the result of an escape, then jurisdiction is not lost. *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C. A. 5), certiorari denied, 338 U. S. 904. An accused may not benefit from his own wrong. But there was no escape here; all of appellee's movements after her initial arrest and confinement in March 1953 (R. 3, ¶13) were involuntary.

On the assumption under the present heading that appellee was properly subject to the Uniform Code while in England as a person "accompanying the armed forces of the United States without the continental limits of the United States" (Art. 2(11), UCMJ), she was, by affirmative act of the Air Force, separated from further military jurisdiction in two aspects:

First, when she was placed in civilian custody, as distinguished from that of the armed forces, she was outside the terms of Art. 2(7), UCMJ.

Second, when she was returned to the United States, she was no longer within the terms of Art. 2(11), UCMJ.

True, as long as her conviction remained in force, she was, under the present assumption, properly confined. *Ex parte Ortiz*, 100 Fed. 955 (C.C.D. Minn.); cf. *United States v. Chambers*, 291 U. S. 217; *Massey v. United States*, 291 U. S. 608. Therefore it does not follow, as appellant seems to think (U. S. Br. 70), that a valid exercise of jurisdiction under Art. 2(11) would be defeated by execution, in accordance with Art. 58, of a sentence duly affirmed.

¹² For dramatic illustrations of the effect of a change of status on military jurisdiction, see *United States v. Cook*, 336 U. S. 210, and *Toth v. Quarles*, 350 U. S. 11. True, the discharges there preceded the preferring of charges, but, in view of the unbroken line of rulings, *supra*, pp. 23-25, as to the effect of a discharge on pending charges, the ultimate result could not have been different in either of the cited cases.

Similarly, if appellee had retained a military status, the setting aside of her conviction would not have divested jurisdiction (cf. U. S. Br. 66). But here, when that conviction was set aside, she was no longer within the terms of the Uniform Code, for the two reasons just stated, which will be discussed in order.¹³

The foregoing is not varied by the circumstance that a rehearing at military law is, as appellant correctly states (U. S. Br. 67-68), a continuation of the original proceeding. Appellee freely admitted this below.¹⁴ But, as the termination-of-jurisdiction rulings show, *supra* pp. 23-24, and as the Air Force recognized in the *Sippel* case, *supra*, p. 25, an affirmative separation at any stage of the proceedings has always been recognized as effective to destroy further military jurisdiction.

¹³ It may be asked why, if the assertion in the text is true, appellee did not seek release by habeas corpus the moment her conviction was reversed by the Court of Military Appeals. The answer is that, under Art. 3(a), UCMJ, which at that time was valid within the District of Columbia (*Talbot v. United States ex rel. Toth*, 215 F. 2d 22), the Air Force could have reasserted military jurisdiction. That obstacle was not removed until this Court reversed the D. C. Circuit on November 7, 1955 (*Toth v. Quarles*, 350 U. S. 11). The present proceeding was filed just ten days later (R. 1).

¹⁴ "The Court [Tamm, J.]: What then do you say to the Government's statement that the conviction has not been set aside in their decision and that the term 'rehearing' does not constitute a new trial but is rather a continuation of the preceding trial.

"Mr. Wiener: I agree that it is a continuation of the preceding trial. It is like any case here, your Honor. If someone is indicted and tried in this court and the Court of Appeals sets aside the conviction and the defendant is retried, that is a continuation of the existing proceeding.

"But I say that it makes no difference because the Army has held that where the man has been tried and he is separated pending approval of the proceedings, jurisdiction is gone. I am perfectly prepared to concede that it is one proceeding." Tr. 10 (not printed).

B. Persons Convicted by Court-Martial and Then Placed in Civilian Custody Are Not Subject to Military Law

In view of the reliance placed by appellant on cases involving military prisoners (U. S. Br. 70-71), it may be helpful to review briefly the course of legislation and decision dealing with court-martial jurisdiction over such persons.

By way of preliminary, it should be stated that there are military penal and correctional institutions, under the jurisdiction of the several armed forces (e.g., 10 U.S.C. §§ 1451, 1453-1458; 34 U.S.C. § 605), which are wholly separate from the federal civilian prison system administered by the Attorney General (18 U.S.C. §§ 4001 *et seq.*).

1. R. S. § 1361 (which derived from Section 12 of the Act of March 3, 1873, c. 249, 17 Stat. 582, 584, as amended by the Act of May 21, 1874, c. 186, 18 Stat. 48) provided that inmates of the Military Prison at Fort Leavenworth undergoing sentence of court-martial should be liable to trial by court-martial for offenses committed during said confinement. Since any military prisoner who had been dishonorably discharged from the service became, in consequence of such discharge, once more a civilian, Winthrop (*144, 146; reprint, pp. 105-107) and successive Judge Advocates General maintained that, as applied to such prisoners, R. S. § 1361 was unconstitutional (Dig. Op. JAG, 1901, p. 294, §§ 1033-1034; *id.*, 1895, pp. 326-327, ¶8; *id.*, 1880, pp. 212-214, ¶8).

Notwithstanding rulings to the contrary (*Ex parte Wildman*, Fed. Case No. 17,653a (D. Kan.); 16 Op. Atty. Gen. 292), the military lawyers were unconvinced: "With these opinions the Judge Advocate General's Office has never been able to concur, and a recent ruling made by the acting Judge Advocate General to the effect that discharged soldiers held as convicts at the Military Prison, being civilians, were not amenable to trial by summary courts, was concurred in, and action directed accordingly, by the Major

General Commanding, July 3, 1892: Dig. Op. JAG, 1895, p. 327.

2. Shortly thereafter, however, R. S. § 1361 was again sustained. *In re Casey*, 70 Fed. 969 (C.C.D. Kan.), in an opinion that relied on the Fifth Amendment and on *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D. Calif.).¹⁵ At this point the Judge Advocate General capitulated. And, since the Military Prison, to which alone R. S. § 1361 applied, had been discontinued, requiring a dishonorably discharged soldier sentenced to confinement to be held in post guardhouses, new legislation was necessary to subject them to military law. Sec. 5 of the Act of June 18, 1898, c. 469, 30 Stat. 483, 484, accordingly provided: "That soldiers sentenced by court martial to dishonorable discharge and confinement shall, until discharged from such confinement, remain subject to the Articles of War and other laws relating to the administration of military justice."¹⁶

3. *Carter v. McClaghry*, 183 U. S. 365, the next military prisoner case, is really not very helpful in the present connection. Carter's contention was that, having been dismissed the service, he was a civilian, and could therefore not be further imprisoned under a sentence adjudged by court-martial; appellee of course (see p. 26, *supra*) makes no such argument.

Next, the question of jurisdiction over prisoners was not in the case, as Carter had been tried, not for anything he did as a prisoner, but for an offense committed while still an officer of the Army. Third, R. S. § 1361 was inapplicable, because it referred to the Military Prison at Fort Leavenworth, which some years earlier had been discon-

¹⁵ Both the *Bogart* case and the Fifth Amendment approach have since been disapproved in *Toth v. Quarles*, 350 U. S. 11. See pp. 38-39, and 76-81, *infra*.

¹⁶ For the legislative history, see H. R. Doc. 119, H. R. Reps. 224 and 1422, and S. Rep. 1234, all 55th Cong., 2d sess. The later Judge Advocate General's rulings are in Dig. Op. JAG, 1912, p. 513, ¶ VIII-G/2-b.

tinued and transferred to the Department of Justice, for use as a civilian penitentiary. Act of March 2, 1895, c. 189, 28 Stat. 910, 957. Therefore, as indeed the report of the case shows (183 U. S. at 366 and 374), Carter was held, not in the Military Prison at Leavenworth, to which alone R. S. § 1361 applied, but in the United States Penitentiary at the same place, then as now a civilian institution. It follows that the dictum (183 U. S. at 383)—

“He was a military prisoner though he had ceased to be a soldier; and for offenses committed during his confinement he was liable to trial and punishment by court-martial under the rules and articles of war. Rev. Stat. § 1361.”

—is on its face inapplicable; and, in consequence, unsound.

4. Section 5 of the 1898 Act (*supra*, p. 29) seems never to have been judicially construed—nor expressly repealed. But in the 1916 Articles of War it was reenacted in substance.

AW 2(e) of 1916 subjected to military law “All persons under sentence adjudged by courts-martial.” In *Kahn v. Anderson*, 255 U. S. 1, this was held to confer jurisdiction on a court-martial to try a discharged soldier who had committed an offense while a military prisoner. The voluminous briefs in the case (No. 421, Oct. T. 1920) show that neither side cited Winthrop or the earlier rulings of The Judge Advocate General. It may well be, therefore, that the result of the *Kahn* case will not survive reexamination in the light of more thorough consideration.^{16a} But it is not necessary to pursue that interesting speculation, be-

^{16a} Overruling of *Kahn v. Anderson* would not in fact create disciplinary problems in military prisons. By suspending the execution of the dishonorable discharge until the expiration of the prisoner's confinement (MCM, 1951, § 97a), his military status, and hence his subjection to military law, would continue; since, plainly, neither expiration of his enlistment or of his commission destroys military jurisdiction. *Supra*, page 22. And, with the execution of his discharge suspended, he can point to no affirmative act on the part of the Government that has returned him to civilian status.

cause the significant point now is that military jurisdiction over prisoners has since been significantly restricted.

5. In 1920, AW 2(e) was reenacted without change, while AW 42 of that year limited the kinds of offenses and the types of sentences for which military offenders could be confined in a penitentiary.

The Uniform Code effected two changes. First, it permitted convicted military persons to be confined, regardless of whether their discharges or dismissals had been executed, and regardless of the length of their sentences, "in any penal or correctional institution under the control of the United States, or which the United States may be allowed to use;" —and, highly significant—"persons so confined in a penal or correctional institution not under the control of one of the armed forces shall be subject to the same discipline and treatment as persons confined or committed by the courts of the United States or of the State, Territory, District, or place in which the institution is situated." Art. 58(a), UCMJ.¹⁷

And, concomitantly with this change, military jurisdiction over persons sentenced by court-martial was correspondingly restricted; Art. 2(7), UCMJ, subjects to the Code only "All persons *in custody of the armed forces* serving a sentence imposed by a court-martial." [*Italics added.*]¹⁸


¹⁷ * * * The Army in operating under AW 42 has met with great difficulty in segregating the varied types of prisoners, and in giving them specialized treatment. * * * From past experience, the services have found that the type of treatment suited for individuals does not depend on the type of offense or on the length of the sentence. Many of the prisoners who cause special problems in disciplinary barracks are those convicted of military offenses, such as a. w. o. l. or desertion." H. R. Rep. 491, 81st Cong., 1st sess., p. 28; S. Rep. 486, 81st Cong., 1st sess., p. 25.

¹⁸ The legislative history of Art. 2(7) is not particularly illuminating: H. R. Rep. 491, p. 10; S. Rep. 486, p. 7; both 81st Cong., 1st sess. But this, like *Greenwood v. United States*, 350 U. S. 366, 374, "is a case for applying the canon of construction of the way who said, when the legislative history is doubtful, go to the statute."

Consequently, under the Uniform Code, the only persons sentenced by court-martial and who are placed in civilian penal institutions pursuant to the authority conferred by Art. 58(a), UCMJ, who remain "military prisoners" are those whose discharges have not been executed. Those placed in civilian prisons after execution of their discharges or dismissals, and those civilians, like appellee, who were always such, are in consequence freed from further military control.

Therefore, since in this case appellee has at all times after June 1953 (R. 2) been otherwise than "in custody of the armed forces" (Art. 2(7), UCMJ), since after June 1953 she has been continuously in institutions "not under the control of one of the armed forces" (Art. 58(a), UCMJ), and since she was placed in such custody by the Air Force (R. 2, 8-9; Ex. I, J, R. 123; Ex. L, R. 124-128), it is plain that the Air Force put her where she was no longer subject to military jurisdiction. It necessarily follows that, once her conviction was set aside, she could not further be restrained by the Air Force, much less tried by Air Force court-martial.

Appellant's argument (U. S. Br. 71) that "Appellee's status as a military prisoner alone suffices to preserve military jurisdiction," entirely overlooks the fact that, reading Arts. 2(7) and 58(a), UCMJ, together, appellee ceased to be a military prisoner when she was placed in institutions that were under the supervision, jurisdiction and control, not of any of the armed forces, but of the Department of Justice, the Government of the District of Columbia, and the Department of Health, Education and Welfare, respectively.



C. Where, by Affirmative Act of the Government, a Civilian Ceases to Accompany the Armed Forces Without the Territorial Limits of the United States, Military Jurisdiction Over Him Pursuant to Art. 2(11), UCMJ, Is Destroyed

The jurisdiction over civilians asserted in Art. 2(11), UCMJ, is a territorial jurisdiction. It does not extend to all persons "serving with, employed by, or accompanying the armed forces," but only to the persons in those categories who are "without the continental limits of the United States and without the following territories: Alaska east of Long 172° West; the Canal Zone; the main group of the Hawaiian Islands, Puerto Rico; and the Virgin Islands."¹⁹

Since, then, the jurisdiction is geographical, removal of the individual concerned, by the Government, to a place outside the named geographical limits, would seem to terminate jurisdiction over him, just as effectively as discharge terminates military status, or just as effectively as removal from every other geographical unit terminates the jurisdiction of that unit.

In the absence of extradition or rendition proceedings, the person who has left the territory of a state can no longer be punished by that state. And while there can be extradition to territory that is under military control (*Neely v. Henkel*, 180 U. S. 109), there can be no extradition back to a status that is under military control where such status has no territorial basis (*Toth v. Quarles*, 350 U. S. 11).

As applied here, the Air Force destroyed further Art. 2(11) jurisdiction over appellee when it returned her to the United States, since at that point she was no longer "accompanying the armed forces of the United States without the continental limits of the United States." Once back in this country she was no longer within the terms of Art. 2(11), and therefore was no longer subject to the

¹⁹ Art. 2(12) is similarly limited geographically.

Code, The Air Force by its own act destroyed her military status.

Some decisions under Art. 2(11) and its predecessor, AW 2(d) of 1920, turn on the question whether, still being overseas, the civilian concerned continues to accompany the armed forces or merges with the civilian population. See *United States v. Schultz*, 1 USCMA 512, 518-519, 4 CMR 104, 110-111; *United States v. Rubenstein*, 19 CMR 709, 773-777, petition for review granted by USCMA and pending as No. 7278. Where the civilian escapes, there is no difficulty in holding that by his wrongful act he has not succeeded in destroying the jurisdiction that had earlier attached. *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C.A. 3), certiorari denied, 338 U. S. 904. Where he is simply discharged, he may well still continue, in fact, to accompany the forces. See *In re Di Bartolo*, 50 F. Supp. 929 (S.D.N.Y.). Where, after his discharge, he leaves the military camp, and ceases, in fact, to accompany the forces, it would seem that jurisdiction has been lost. True, *Perlstein v. United States*, 151 F. 2d 167 (C.A. 3), did indeed hold that a civilian, discharged in Eritrea in 1942, could be apprehended in Egypt, to which he had proceeded on his way home, and then be returned to Eritrea for trial by court-martial. This seems questionable; it may well have been this aspect of a war-time camp-follower case that induced the granting of certiorari, 327 U. S. 777.²⁰

Apart from the doubtful *Perlstein* case, there is nothing in the cases, and assuredly nothing as a matter of principle, to sustain the proposition that a criminal jurisdiction carefully circumscribed to explicit geographical limits survives a removal of the accused, by the act of the prosecuting sovereignty, outside those limits.

But there is a further and, it is believed, controlling reason, why jurisdiction to retry appellee ceased once she was in this country with her conviction set aside.

²⁰ The writ was dismissed only because, by reason of petitioner's release, the case became moot. 328 U. S. 822.

Under this heading it has been assumed that Art. 2(11) is constitutional because limited in its operation to overseas areas.²¹ No one—at least until the present proceeding was commenced—had ever contended that civilians accompanying the forces in the United States in time of peace are subject to military law. For such civilians are entitled to a trial by jury, guaranteed in the original Constitution (Art. III, Sec. 2) and in the Sixth Amendment as well. Therefore, once appellee was brought into the District of Columbia, still being a civilian, she came within that dual protection—just as the slave *Somerset* became free once he touched English soil. *Somerset v. Stewart*, 101 1, 21 How. St. Tr. 1.

For appellant therefore to suggest that ordering appellee's retrial in the District of Columbia is a mere "happenstance" (U. S. Br. 71) is surely to trivialize a guarantee held so vital that, alone among all the others, it appears in the Constitution not simply once, but actually twice.

Does this mean, asks appellant (U. S. Br. 65-66), that appellee must have been held in England for possible retrial to avoid loss of military jurisdiction? The answer is yes, because in this instance that jurisdiction is narrowly geographical.

It is not without significance in this connection that, in the days when court-martial jurisdiction over civilians was limited by statute to time of war, it was held that "the jurisdiction, to be lawfully exercised, must be exercised during the *status belli*." Dig. Op. JAG, 1912, p. 151. *LXIII B 1; Winthrop *138, *141 (reprint, pp. 102, 104). Similarly, a spy cannot be tried for violation of the laws of war after the war has ceased. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

Appellant simply does not face up to the circumstance that, assuming for purposes of argument the constitution-

²¹ The constitutional bases of that assumption are discussed at length below, pp. 81-86.

ality of a provision subjecting to trial by court-martial a civilian "accompanying the armed forces without the continental limits of the United States," there is no assumption whatever that can be made for subjecting to trial by court-martial any civilian who, in time of peace, is within the continental limits of the United States. The Constitution forbids.

But the assumption under this heading, that Art. 2(11) is constitutional, will not survive examination. Appellee therefore turns to such examination.

III. ARTICLE 2(11) OF THE UNIFORM CODE OF MILITARY JUSTICE IS UNCONSTITUTIONAL TO THE EXTENT THAT IT PURPORTS TO AUTHORIZE THE TRIAL OF CIVILIANS BY COURT-MARTIAL IN TIME OF PEACE

In his brief in *Toth v. Quarles*, 350 U. S. 11, the present Solicitor General said (U. S. Br., No. 3 this Term, p. 31, n. 14): "Indeed, we think the constitutional case is, if anything, clearer for the court-martial of Toth, who was a soldier at the time of his offense, than it is for a civilian accompanying the armed forces."

Since the Court held that there was no constitutional basis for the court-martial of Toth, an ex-airman, it would seem to follow as an *a fortiori* proposition that one who had been a civilian all of her life could not be subjected to military jurisdiction in time of peace either.

A review of the authorities will serve to demonstrate the soundness both of the Solicitor General's concession and of the ruling now under review.

As will appear below, appellee relies on the *Toth* case, which reaffirms the views of Winthrop and the published rulings of The Judge Advocate General of the Army over a forty-year period, both to the effect that civilians cannot constitutionally be subjected to military jurisdiction in time of peace.

Appellant for his part puts forward two admitted dicta (U. S. Br. 41), in *Duncan v. Kahanamoku*, 327 U. S. 304, 313, and in *Madsen v. Kinsella*, 343 U. S. 341, 344, 361, together with the recent decision of the Court of Military Appeals in *United States v. Burney*, decided on March 30, 1956, after this Court had announced that it would hear arguments on the constitutional validity of Art. 2(11), UCMJ.²¹ Since, on any view of the proper scope of collateral review of court-martial proceedings, inquiry may always be made "whether the military court had jurisdiction of the person" (*Carter v. McClaughry*, 183 U. S. 365, 380-381; cf. *Burns v. Wilson*, 346 U. S. 137, 844-851), it follows that no military court, not even the civilian tribunal at the capstone of the military appellate hierarchy, can conclusively determine the outer limits of military jurisdiction. The *Burney* decision, therefore, can have no more authority than such as inheres in its intrinsic soundness. The Government, which repents that decision in its brief in No. 713, pp. 30-90, and here incorporates it by reference (U. S. Br. 41), has espoused its reasoning. *Burney* will, therefore, be treated herein simply as a legal argument advanced on appellant's behalf, and will be referred to throughout as "*Burney* Appendix".

In the argument that follows, appellee will show, first, that the *Toth* case simply reaffirms traditionally accepted concepts of the scope of military jurisdiction; next, that military jurisdiction over civilians was, before 1916, always limited to those who in time of war accompanied the forces in the field; third, that when such jurisdiction was extended to civilians overseas in time of peace, in

²¹ The Court of Military Appeals had previously, on several occasions, upheld the Art. 2(11) jurisdiction over accompanying civilians. *United States v. Weiman*, 3 USCMA 216, 11 CMR 216 (August 21, 1953); *United States v. Garcia*, 5 USCMA 88, 17 CMR 88 (November 5, 1954); *United States v. Robertson*, 5 USCMA 806, 19 CMR 102 (May 27, 1955).

1916 and again in 1950, Congress was not even advised of the existence of a constitutional question.

Appellee then proceeds to show that dependent wives have never been considered a part of the armed forces, and that from 1775 to 1950, no dependent wife was ever tried by an American court-martial.

The specific constitutional issues involved are next discussed. Appellee shows that the trial of civilians by court-martial in occupied territory rests on the war power, and so cannot justify the trial involved here; and, because of appellant's thoroughgoing confusion between war and peace, a confusion that pervades all of his arguments, proceeds to restate the differences involved.

Appellee next shows that Art. 2(11), UCMJ, cannot be supported by anything in the Fifth Amendment, and then explains why the court-martial power is not greater overseas in time of peace than it is in the United States. And, finally, appellee demonstrates that the disciplinary considerations underlying the court-martial power do not justify the trial of dependent wives by court-martial.

A. *Toth v. Quarles*, 350 U. S. 11. Simply Reaffirms the Traditionally Accepted Unconstitutionality of Any Legislative Attempts to Subject Civilians to Court-Martial Jurisdiction in Time of Peace

In *Toth v. Quarles*, 350 U. S. 11, this Court established three propositions that control the present case:

1. The clause "cases arising in the land or naval forces" in the Fifth Amendment does not constitute a grant of court-martial jurisdiction. 350 U. S. at 14.

2. The power granted Congress "To make Rules for the Government and Regulation of the land and naval Forces", Clause 14 of Article I, Section 8, "would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces." 350 U. S. at 15.

3. Clause 14, just quoted, is not broadened by anything in the Necessary and Proper Clause, and is to be narrowly limited to "the least possible power adequate to the end proposed", citing *Anderson v. Dunn*, 6 Wheat. 204, 231, 350 U. S. at 21-23.

It resulted from the foregoing that Congress lacked power to subject former members of the armed forces to military jurisdiction, and that Article 3(a), UCMJ, was accordingly unconstitutional. In so holding, the Court was simply deciding what Colonel Winthrop had always contended as to the unconstitutionality of earlier recapture provisions²² (1 Winthrop *144-146 [reprint pp. 105-107]), just as, a few years earlier, in *United States v. Cooke*, 336 U. S. 210, the Court had sustained Winthrop's opinion that reenlistment cannot revive a military jurisdiction once terminated by discharge. 1 Winthrop, *124 (reprint, p. 93).

In the view of the court below, the necessary implication of *Toth* was that there is no constitutional power to subject a civilian to court-martial jurisdiction in time of peace; as Judge Tamm said (R. 132), "a civilian is entitled to a civilian trial." That implication and that ruling, likewise, not only follow what Winthrop stoutly maintained, but are also in accord with the published views of successive Judge Advocates General of the Army over many years. Neither the scope of the *Toth* case, therefore, nor the ruling now under review, can be dismissed as recent revelations unsuspected by earlier generations of military lawyers.

In a section of his classic treatise entitled "General Principle of Non-Amenability of Civilians to the Military Jurisdiction in Time of Peace", Winthrop wrote (*143; reprint, p. 105), "That a civilian, entitled as he is, by Art. VI of the Amendments to the Constitution, to trial by jury, cannot legally be made liable to the military law and

²² AW 60 of 1874; AW 94 of 1916, 1920, and 1948; AGN 14 (Eleventh).

jurisdiction, in time of peace, is a fundamental principle of our public law²³; and, after a lengthy discussion of the "Constitutionality of the Statutes" to the contrary, notably AW 60 of 1874, he concluded with the italicized observation (*146; reprint p. 107) that "*a statute cannot be framed by which a civilian can lawfully be made amenable to the military jurisdiction in time of peace.*"

In expressing these views, Colonel Winthrop was in no sense giving vent to private opinions at variance with those of his official superiors. To the contrary, Winthrop was simply writing in his treatise just exactly what The Judge Advocate General of the Army had published to the service and to the public over a forty-year period.

Here are the pertinent paragraphs from the 1912 *Digest of Opinions of The Judge Advocates General of the Army*:

"VIII G 2 a. [p. 513.] By the sixth amendment of the Constitution, civilians are guaranteed the right of trial by jury 'in all criminal prosecutions.' Thus—in time of peace—a court-martial can not assume jurisdiction of an offense committed by a civilian without a violation of the Constitution. It is only under the exceptional circumstances of a time of war that civilians may, in certain situations, become amenable to trial by court-martial." P. 513, citing rulings from 1866, 1867, and 1905.²³

"VIII G 2 a. (1). [p. 513.] Held that any statute which attempts to give jurisdiction over civilians, in time of peace, to military courts is unconstitutional." P. 513, citing rulings from 1879, 1905, and 1906.²⁴

"LXIII B. [p. 151.] The jurisdiction authorized by this article [AW 63 of 1874, *infra* p. 43] can not be extended to civilians employed in connection with

²³ The two earlier opinions are also digested in the Digest of 1880 at p. 211, ¶ 7; in the Digest of 1895 at pp. 325-326, ¶ 7; and in the Digest of 1901 at pp. 293-294, ¶ 1031.

²⁴ The first opinion is also digested in the Digest of 1880 at p. 212, ¶ 8; in the Digest of 1895 at p. 326, ¶ 8; and in the Digest of 1901 at p. 294, ¶ 1032.

the Army in time of peace [citing 16 Op. Att'y Gen. 13 and 48], nor to civilians employed in such connection during the period of an Indian war, but not on the theater of such war." P. 151, citing a ruling from 1877, with related rulings from 1877, 1903, and 1909.²⁵

Surely those who expressed and published the foregoing views cannot fairly be charged either with espousing a doctrinaire brand of libertarianism, with lack of martial ardor, or with less than full devotion to the cause and the needs of the armed forces. The present case is therefore preeminently one calling for an application of the rule that opinions of The Judge Advocate General of the Army on questions of military law are entitled to particular weight. *United States v. Cooke*, 336 U. S. 210, 216; *Hiatt v. Brown*, 339 U. S. 103, 109; cf. *Bowen v. Johnston*, 306 U. S. 19, 30.

Indeed, prior to 1916 there is, with respect to the non-amenability of civilians to trial by court-martial, not even the shadow of a philosophical doubt, let alone a dissenting voice; other military writers of the period, General Davis, a former Judge Advocate General, and Colonel Dudley, Professor of Law at West Point, expressed identical views. Davis, *A Treatise on the Military Law of the United States* (3d ed. 1915) 52-53, 478-479; Dudley, *Military Law and the Procedure of Courts-Martial* (2d ed. 1908) 413-414.

The result of the foregoing is this, that the ruling now under review reflects, not any new departure, but rather a return to basic first principles.

²⁵ The earlier rulings will also be found in the Digest of 1880 at p. 49, ¶ 5; in the 1895 Digest at p. 76, ¶ 5; and in the 1901 Digest at p. 57, ¶ 165.

Winthrop, it is true, published his last edition in 1896, before the Spanish War, and died on April 8, 1899,²⁶ three days before the effective date of the Treaty of Paris. 30 Stat. 1754. And so appellant says (U. S. Br. 44), "the world about which Colonel Winthrop wrote no longer exists." Perhaps not; but the Constitution whose military clauses he expounded still does.

The opinions of The Judge Advocate General are dismissed with the footnote comment (U. S. Br. 45, p. 23) that "it seems clear that [they] dealt with civilians *within the United States* * * * ." But although the latest of those rulings are from 1905 and 1906 (*supra*, p. 40), as was indicated in appellee's Motion to Dismiss, &c., at 8, their full text is not produced. It is therefore not at all clear that they were limited as appellant now suggests. And since any privilege that may have attached to those opinions has of course been waived by their publication in digest form, is it not fair to infer from the fact of non-production that their full text would not be favorable to appellant? *Clifton v. United States*, 4 How. 242, 247.

Appellant makes no comments on the views of General Davis, last published in 1915, nor on those of Colonel Dudley, expressed in 1908. Apparently a general understanding among military lawyers is not considered by him to be of significance in the present connection.

B. The Only Civilians Who Can Constitutionally be Tried by Court-Martial as "Part" of the Armed Forces Are Those Who Accompany Those Forces "In the Field" in Time of War

1. Appellant badly misleads the Court when he says (U.S. Br. 32) that "The concept of subjecting to military jurisdiction civilians accompanying armies is not new."

²⁶ Prugh, *Colonel William Winthrop: The Tradition of the Military Lawyer* (1956) 42 A.B.A.J. 126, 190; Fratcher, *Colonel William Winthrop* (1944) 1 The Judge Advocate Journal, No. 3, p. 12 at p. 14.

It may not have been new to James II (U. S. Br. 32), who assuredly is strange authority to cite in a case involving individual liberties. After all, most Bills of Rights, in his lifetime and thereafter, both in England and in the United States, were designed to prevent in the future any recurrence of the abuses which characterized that monarch's reign. But, certainly with respect to American military codes prior to 1916, appellant's quoted statement is demonstrably untrue—unless it is materially qualified. For it is an historical fact that, until Congress was induced to enlarge the jurisdiction in 1916, without any intimation that a constitutional question was involved, and without being advised of the earlier precedents (see *infra*, pp. 52-60), camp-follower jurisdiction in the United States was always limited to those civilians who, in time of war, accompanied the armies in the field.

The Revolutionary Articles of War dealing with camp followers (Art. XXXII of 1775; Sec. XIII, Art. 23 of 1776) were hardly varied in language when, in 1806, they were reenacted by the Congress of the United States in terms that remained law until 1917.²⁷ Here is AW 60 of 1806:

“All [sutlers and] retainers to the camp, and all persons [whatsoever,] serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war.”

The bracketed words were dropped in 1874 when this article was renumbered as AW 63, sutlers having been legislated out of existence a few years earlier (*infra*, p. 45).

On its face, the quoted provision is unlimited as to time. But AW 60 of 1806 and AW 63 of 1874 were uniformly construed as applicable only in time of war in the field, as

²⁷ The bulk of the 1916 Articles of War did not take effect until March 1, 1917. Sec. 4 of the Act of August 29, 1916, c. 418, 39 Stat. 619, 670.

inapplicable in time of war not in the field, and as wholly inapplicable in time of peace anywhere. See, for the views of the Attorney General to this effect, 16 Op. Atty. Gen. 13 and 48; for those of The Judge Advocate General of the Army, Dig. Op. JAG, 1912, pp. 151-152, ¶¶ LXIII A to LXIII D; *id.*, 1901 pp. 56-58, ¶¶ 161-168; *id.*, 1895, pp. 75-77, ¶¶ 1-8; *id.*, 1880, pp. 48-49, ¶¶ 1-8; and for those of recognized text-writers, Winthrop, *131-138 (reprint, pp. 97-102); Davis, *op. cit. supra*, pp. 52-53, 478-479; Dudley, *op. cit. supra*, pp. 413-414.

Consequently, appellant's unqualified assertion (U. S. Br. 32), quoted above, involves a palpable misstatement of American military law as it was understood and applied over many years, and moreover wholly blurs the vital distinction between war and peace. See further, pp. 69-76 *infra*. Rarely has a litigant rested his appeal on a more fallible foundation.

2. Not only, then, was military jurisdiction over civilians deemed limited in its exercise to time of war and in the field, but the boundaries of the jurisdiction were at all times maintained within rigorously contracted limits. Thus, in the case of the many undeclared Indian wars that marked our military history in the last half of the Nineteenth Century, it was ruled that court-martial jurisdiction could not be extended "to civilians employed in such connection during the period of an Indian war, but not on the theater of such war" (Dig. Op. JAG, 1912, p. 151, ¶ LXIII B; *id.*, 1901, p. 57, ¶ 165; *id.*, 1895, p. 76, ¶ 5; *id.*, 1880, p. 49, ¶ 5). And it was likewise ruled, in 1877 and again in 1903 and 1909, that "In view of the limited theater of Indian wars, this exceptional jurisdiction is to be extended to civilians, on account of offenses committed during such wars, with even greater caution than in a general war" (Dig. Op. JAG, 1912, p. 151, ¶ LXIII B; *id.*, 1901, p. 57, ¶ 165; *id.*, 1895, p. 76, ¶ 5; *id.*, 1880, p. 49, ¶ 5). *Accord*, Winthrop, *136-137 (reprint, p. 161). Therefore, to the extent that today, (*Burney* Appendix, p. 75) "our foreign

armies may be likened to the Army garrisons in the far west during the days of the Indian wars," historical precedent is strongly against the appellant.

Significantly enough, this limited and exceptional jurisdiction over civilians was held not to survive the end of a war, whether general or against Indians. "The jurisdiction, to be lawfully exercised, must be exercised *during the status belli*." Dig. Op. JAG, 1912, p. 151, ¶ LXIII B 1; *id.*, 1901, p. 57, ¶ 166; *id.*, 1895, p. 76, ¶ 6; *id.*, 1880, p. 49, ¶ 6; Winthrop, *138 (reprint, p. 102). In this respect the jurisdiction to try civilians by court-martial resembled the jurisdiction to try a spy, which, it was held, disappeared once the war ended. *Matter of Martin*, 45 Barb. 142, 31 How. Pr. 228.

3. It made no difference that the civilian in question lived on the post and was closely connected functionally with the operations of the Army; there was still no jurisdiction to try him by court-martial in time of peace, as is shown by the situation of the now all but forgotten post trader.

Post traders functioned for about a generation, after the abolition of sutlers effective July 1, 1867 (by Sec. 25 of the Act of July 28, 1866, c. 299, 14 Stat. 332, 336) and before post canteens had been transformed into the now familiar post exchanges in 1892.²⁸

²⁸ Although further appointments of post traders were terminated by the Act of January 28, 1893, c. 51, 27 Stat. 426, their disappearance overlapped the emergence of the successor institutions. Post canteens had long been organized and their formal regulation, however, appears to date from General Orders 10, H.Q. of the Army, 1889. By General Orders 11, H.Q. of the Army, 1892, it was directed that "The institution now designated as the Post Canteen will be hereafter known as the Post Exchange," and the Act of July 16, 1892, c. 195, 27 Stat. 174, 178, reflected the new designation.

Other accounts of the emergence of the post exchange (*Standard Oil Co. v. Johnson*, 316 U. S. 481, 483-484; *Dugan v. United States*, 34 C. Cls. 458) appear to overlook the earlier directives.

By the Joint Resolution of March 30, 1867, No. 33, 15 Stat. 29, as well as by Sec. 22 of the Act of July 15, 1870, c. 294, 16 Stat. 315, 319-320 (later R. S. § 1113), it was declared "That such traders shall be under protection and military control as camp followers"; and by Sec. 3 of the Act of July 24, 1876, c. 226, 19 Stat. 97, 100 (which, according to the Attorney General, 15 Op. Atty. Gen. 278, 280, did not repeal R. S. § 1113), it was further provided that every post trader "shall be subject in all respects to the rules and regulations for the government of the Army."

The generality of these provisions differs not one bit from the broad language of AW 63 of 1874 (*supra*, p. 43) which declared that "all persons serving with the armies of the United States in the field, though not enlisted soldiers, are to be subject to orders, according to the rules and discipline of war." According to appellant's reading of the pre-1916 Articles of War (U. S.-Br. 34), it would follow that Congress had subjected post traders to military jurisdiction. But The Judge Advocate General of the Army held precisely the contrary (Dig. Op. JAG, 1901, p. 563, ¶ 2023; *id.*, 1895, pp. 599-600, ¶ 4; *id.*, 1880, p. 384, ¶ 4):

"A post trader is not, under the Act of 1876, and was not under that of 1867 or 1870, amenable to the jurisdiction of a military court in time of peace. The earlier statutes assimilated him to a camp-follower, but, strictly and properly, there can be no such thing as a camp follower in time of peace, and the only military jurisdiction to which a camp follower may become subject is that indicated by the 63d Article of War, viz. one exercisable only 'in the field' or on the theatre of war. Nor can the Act of 1876, in providing that post traders shall be 'subject to the rules and regulations for the government of the army', render them amenable to trial by court martial in time of peace. . . . If . . . the Articles of War are intended to be included, the amenability imposed is simply that fixed by the particular Article applicable to civilians employed in connection with the Army,

viz. Art. 63, which attaches this amenability only in time of war and in the field. Thus, though post traders might perhaps become liable to trial by court martial if employed on the theatre of an Indian war, as persons serving with an Army in the field in the sense of that Article, they cannot be made so liable when not thus situated * * *

The foregoing should serve as a conclusive answer to any who, in the face of consistent precedents to the contrary, still seek to assert that the test is simply whether the particular civilian is "directly connected with the forces" (U. S. Br. 28, 46), or who (*Burney* Appendix, p. 75) analogize today's cold war situation to the Indian-fighting days of the last century.²⁹

4. How far, in time of either general or limited war, the concept of "in the field" may properly be extended, is not in issue here. Both in May 1953, when appellee was tried in England, and in November 1955, when she was sought to be retried in the District of Columbia, the United States was not involved in any declared war, nor were any hostilities in progress at either place. Consequently, discussion of the extent of "in the field" may properly be relegated to the case of *Kinsella v. Krueger*, No. 713, where that question was at least raised by the pleadings. See Point III, pp. 12-16, of the Respondent's Brief in that case.

5. At any rate, Congress made no attempt of any kind to extend military jurisdiction over civilians in time of

²⁹ In *In re Varney*, S. D. Calif., Civil No. 19257-C, Feb. 16, 1956, it was said (Conclusion of Law II (b)). "At that time [i. e., of the adoption of the Constitution], retainers to the military camp and persons having a civilian status serving with the armies in the field were subject to military law and trial by court martial. Petitioner falls within that class of persons thus exempted from the aforesaid provisions of the Constitution and hence subject to military law since prior to the adoption of the Constitution of the United States."

Rarely, it is submitted, will a more egregiously incorrect statement of historical fact be found in a judicial decree.

peace until 1916, when it enacted the revised Articles of War of that year. It will be pointed out below, pp. 52-60, that, at no time during the Congressional consideration of those Articles, and at no time thereafter, was Congress or any Congressional committee ever advised, from any source, either of the limited construction placed on the earlier camp follower Articles, or of the circumstance that any extension of military jurisdiction over civilians in time of peace involved a serious constitutional question.

The point to be noted here is that AW 2(d), as it was enacted in 1916, as it was reenacted in 1920, and as it remained in force until the Uniform Code of Military Justice took effect in 1951, came before the civil courts only in cases that arose out of military trials of civilians in time of war, or in cases where such trials took place in occupied territory—where, see pp. 71-76, *infra*; the war power was being exerted—and never, before the instant proceeding was brought, in any case involving the court-martial of civilians in non-occupied territory in time of peace.

Appellant cites thirteen cases (U. S. Br. 40-41) for the proposition that “The power of Congress to provide for trial by court-martial of civilians accompanying our armed forces overseas has been recognized by this Court as ‘well-established’ * * * and has been repeatedly enforced by the lower federal courts.” But even under preliminary analysis, appellant’s authorities, like old soldiers, simply fade away: Only a single one of those cases deals with the question now at issue, the power to court-martial civilians in time of peace in other than occupied territory—and that sole exception is presently under review in No. 713, this Term!

A. This Court’s asserted “recognition” of the Congressional power is based on two admitted (U. S. Br. 41) dicta: In *Duncan v. Kahanamoku*, 327 U. S. 304, the question concerned war-time martial law in Hawaii, not

military law under the Articles of War, and the cases cited by the Court at 313 were war time camp-follower cases.³⁰ And *Madsen v. Kinsella*, 343 U. S. 341, which arose in occupied territory, is not in point for the reasons stated below at pp. 69-77, and the dictum is moreover valueless as a precedent, as is pointed out at p. 64.

B. Six other cases relied on by appellant arose in time of war.³¹ Since no one has ever seriously questioned the exercise of jurisdiction over camp-followers in time of war in the field, those cases do not help appellant here. The only questions in the war-time situation are, first, whether the particular case in fact arose "in the field";³² and, second, whether jurisdiction had terminated by reason of the accused's ceasing to accompany the forces.³³

C. Two other cases relied on by appellant arose in occupied territory, where the court-martial of civilians rests on the war power and not on the power to govern the

³⁰ *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.); *Ex parte Falls*, 251 Fed. 415 (D.N.J.); *Ex parte Jochen*, 257 Fed. 200 (S.D. Tex.); *Hines v. Mikell*, 259 Fed. 28 (C.A. 4), certiorari denied, 250 U. S. 645.

³¹ *Hines v. Mikell*, *Ex parte Gerlach*, *Ex parte Falls*, *Ex parte Jochen*, all *supra* note 30; *In re Berue*, 54 F. Supp. 252 (S.D. Ohio); *Perlstein v. United States*, 151 F. 2d 167 (C.A. 3), certiorari granted, 327 U. S. 777, and dismissed because moot, 328 U. S. 822.

More complete study would have disclosed the following additional war-time camp-follower cases: *In re DiBartolo*, 50 F. Supp. 929 (S.D.N.Y.); *McCune v. Kilpatrick*, 53 F. Supp. 80 (E.D. Va.); and *Shilman v. United States*, 73 F. Supp. 648 (S.D.N.Y.), reversed in part, 164 F. 2d 649 (C.A. 2), certiorari denied, 333 U. S. 837.

³² *Ex parte Falls*, *Hines v. Mikell*, *Ex parte Jochen*, *In re Berue*, all *supra* note 30; *McCune v. Kilpatrick*, *supra* note 31; and the following cases not cited by appellant: *Ex parte Weitz*, 256 Fed. 58 (D. Mass.); *Walker v. Chief Quarantine Officer*, 69 F. Supp. 980 (D.C.Z.). See pp. 12-16 of Respondent's Brief in No. 713.

³³ *Perlstein v. United States*, *In re DiBartolo*, both *supra*, note 31.

armies.³⁴ This vital distinction, which appellant blurs throughout his argument, is expounded below at pp. 71-76.

D. That leaves only three other authorities.

(i) In *Rubenstein v. Wilson*, 212 F. 2d 631 (D.C. Cir.), the proceeding was remanded for ascertainment of petitioner's exact relationship to the forces. The case was decided by the same Circuit that so shortly thereafter misread constitutional limitations on the court-martial power. *Talbott v. United States ex rel. Toth*, 215 F. 2d 22, reversed *sub nom. Toth v. Quarles*, 350 U. S. 11.

(ii) The *Burney* case, decided by the United States Court of Military Appeals after argument was directed in the present case, is, for reasons already stated (*supra*, p. 37), not an authoritative determination; that court, of course, cannot speak the last word on the scope of its own powers. And whether it may properly be included within the expression "lower federal courts" (U. S. Br. 41), at least as that phrase is normally understood, is probably open to question. Cf. *Shaw v. United States*, 209 F. 2d 811 (D.C. Cir.).

(iii) There is left only appellant's thirteenth case, *United States v. Kinsella*, 137 F. Supp. 806 (S.D. W. Va.)—which is under review as No. 713 of the present Term, and so hardly qualifies as an authority, least of all since the ruling below in the present case is precisely the other way.³⁵

Consequently, once they are accurately and understandingly read, the civilian decisions relied on by

³⁴ *United States ex rel. Mobley v. Handy*, 176 F. 2d 491 (C.A. 5), certiorari denied, 338 U. S. 904; *Grewe v. France*, 75 F. Supp. 433 (E.D. Wis.).

³⁵ On the issue presented here, the district courts are equally divided. The decision below in this case was followed in *Hurlake v. Wilson*, Habeas Corpus No. 94-55, D. D. C., McGarraghy, J., decided January 4, 1956; while the *Kinsella* case was followed in *In re Varney*, *supra* note 29, S.D. Calif., J. M. Carter, J.

appellant that antedate the ruling below. There do not run counter to the views expressed by Winthrop and by successive Judge Advocates General as to the scope of military jurisdiction over civilians in the field in time of war (*supra*, pp. 39-41, 43-47), and do not in any sense sustain the far more extensive jurisdiction now sought to be exerted and justified in the present case.

It may be significant that even the war-time camp-follower jurisdiction is not inherent and requires a statutory basis. Thus the Navy, which until 1943 did not have a statutory war-time jurisdiction over camp followers, was accordingly held to lack power to try accompanying civilians in time of war and in the war zone. *Hammond v. Squier*, 51 F. Supp. 227 (W.D. Wash.); cf. CMO 11 of 1937, pp. 16-19. And the Navy's 1943 statutory jurisdiction was expressly limited to time of "war or national emergency". Act of March 22, 1943, c. 18, 57 Stat. 41; 34 U. S. C. (1946 ed.) § 1201.

6. The traditional military jurisdiction over civilians in time of war is now set forth in Article 2(10), Uniform Code of Military Justice, which subjects to the Code

"In time of war, all persons serving with or accompanying an armed force in the field;"

That jurisdiction is not, and, it is believed, could not successfully be, questioned. That jurisdiction is ample to the real needs of the forces. That jurisdiction is within the traditional limits expounded during what may properly be called the classical period of American military law. That jurisdiction remains within the precise limits that were established in the earliest days of the Revolution. That jurisdiction conforms to the constitutional power "To make Rules for the Government and Regulation of the land and naval Forces", since civilians accompanying the forces in time of war in the field may properly, as a matter of history and of logic and of constitutional development alike, be so far deemed a "part" of the armed

forces as to be subject to trial by court-martial. *Tolh v. Quarles*, 350 U. S. 11, 15. That jurisdiction may be exercised even within the United States, if in time of war unhappily its territory should be included "in the field", for the reason that, when the Constitution was adopted, civilian camp followers with the armies in the field in time of war were not entitled to a jury trial. AW XXXII of 1775; Sec. XIII, Art. 23 of 1776; cf. *Ex parte Quirin*, 317 U. S. 1, 38-41; *Whelchel v. McDonald*, 340 U. S. 122, 126-127.

C. Congress Has At No Time Ever Been Advised Even of the Existence of a Constitutional Question With Respect to the Trial of Civilians by Court-Martial in Time of Peace Outside of Occupied Territory

As was pointed out above, pp. 43-47, court-martial jurisdiction over civilian camp followers, though general in terms (Art. XXXII of 1775; Sec. XIII, Art. 23 of 1776; AW 60 of 1806; AW 63 of 1874), was, before and contemporaneously with the adoption of the Constitution, and for well over a century thereafter, strictly limited in its application to those civilians who, in time of war, accompanied the armies in the field. To that extent, cf. U. S. Br. 32; history and precedent support appellee rather than her adversary.

That jurisdiction was never extended prior to 1916.³⁶ In that year, Brig. Gen. (later Maj. Gen.) E. H. Crowder, then The Judge Advocate General of the Army, appeared before the Senate Committee on Military Affairs to urge the enactment of his revision of the Articles of War, which was enacted into law in August of that year.

His proposal was (Sen. Rep. 130, 64th Cong., 1st sess., p. 2) to confer, in time of peace as well as in time of war, court-martial jurisdiction over "All retainers to the camp and all persons accompanying or serving with the armies

³⁶ In view of the failure of pre-1916 attempts to revise the Articles of War then contained in R. S. § 1542, see U. S. Br. 34-35, it does not seem necessary to analyze their history in detail.

of the United States without the territorial jurisdiction of the United States * * * though not otherwise subject to these articles." This became, without any change, AW 2(d) of 1916 (*infra*, p. 124) which, in that form, remained law through May 30, 1951.

General Crowder explained why, in his view, it would be desirable to extend court-martial jurisdiction over civilians accompanying the Army overseas even in time of peace. See Sen. Rep. 130, 64th Cong., 1st sess., pp. 37-38, quoted—but only in part—at U. S. Br. 35-36.

But nowhere in his justification for this proposal, which enlarged so materially the previously accepted boundaries of military jurisdiction, and which for the first time purported to subject civilians to trial by court-martial in time of peace, did General Crowder advise the Committee that like extension of jurisdiction had been deemed unconstitutional, not only by Colonel Winthrop, whom Crowder himself formally acknowledged, only a few years later, as "the Blackstone of military law, a man of superb reasoning power,"³⁷ but also by a whole series of his own predecessors in the office of Judge Advocate General of the Army. *Supra*, pp. 39-41.

General Crowder was, of course, perfectly free to express disagreement with the prior views of others and with the previously published opinions of his own predecessors. In asking the Congress to expand the hitherto recognized limits of court-martial jurisdiction, he was not precluded from urging, as appellant now does, that the proposed new grant of power rested on the treaty power (U. S. Br. 48-61), or that the constitutional grant of court-martial power somehow has a greater content outside the three-mile limit (U. S. Br. 61-65).

³⁷ *Establishment of Military Justice*, Hearings before a Subcommittee of the Committee on Military Affairs, U. S. Senate, 66th Cong., 1st sess., on S. 64, p. 1171 (Oct. 24, 1919).

Nor was General Crowder foreclosed from suggesting (U. S. Br. 37) that "a broadened class of civilians has come to have the kind of direct relationship to the military which is familiar today", or (U. S. Br. 38) "that the United States was no longer an isolated nation insulated from Europe and Asia by ocean barriers, but that our armed forces, consisting of military and civilian personnel, might be deployed throughout the world even in time of peace", or (U. S. Br. 47) that "at the present time not only weapons of war, but the whole area of defense and the whole system of military arrangements, are very different from those that existed before 1916."

But General Crowder did not say any such things. His testimony (Sen. Rep. 130, 64th Cong., 1st sess., pp. 30, 38) shows that he had in mind only the problem of troops and retainers in transit, and the case of one clerk who embezzled funds in Cuba during the 1906-1909 intervention there, and who could not thereafter be punished because he was within the amnesty proclamation that the Cubans had issued after the American forces evacuated the island.

Moreover, General Crowder did not even mention, let alone discuss, the constitutional implications of his proposal. He not only expressed no opinion of his own at variance with the hitherto published views of earlier Judge Advocates General, he did not advise the Committee of those views, and he did not even apprise the Congress that what he was asking it to enact contained the seeds of a most serious constitutional question. And so Congress adopted A.W. 2(d) in utter ignorance of the existence of a constitutional question. Indeed, all that the Senate Committee said (S. Rep. 130, 64th Cong., 1st sess., p. 18) was that the traditional war-time limitation of camp-follower jurisdiction "has led to some embarrassment under conditions like those which obtained in Cuba after

peace was restored following the Spanish War,³⁸ and also during the second Cuban intervention."³⁹

Appellant makes apparently persuasive arguments (U. S. Br. 37-39, 47) as to what Congress had in mind in 1916. Once the actual documents underlying the 1916 Articles of War are examined, however, it is plain that those contentions, regardless of how much they may reflect the resourcefulness of able advocacy, do not rest on any legislative facts of record.

AW 2(d) became effective on March 1, 1917 (*supra*, p. 43, note 27), and within little more than a month, the United States was at war. 40 Stat. 1. Of the five reported World War I cases involving AW 2(d), three dealt with the scope of "in the field" and so are not relevant here,⁴⁰ and the other two concerned employees on an Army transport. *Ex parte Gerlach*, 247 Fed. 616 (S.D.N.Y.);

³⁸ This is not based on Gen. Crowder's testimony and seems plainly wrong; *Nachy v. Henkel*, 180 U. S. 109, involved a prosecution by the military government after the Treaty of Peace became effective.

³⁹ When the bill was debated in the Senate, Art. 2(d) was not mentioned. 53 Cong. Rec. 3828-3830. Thereafter, the House not having acted, the Articles of War were appended in the Senate as a committee amendment to the Army Appropriation Act for that year. 53 Cong. Rec. 11504-11512. Camp-follower jurisdiction was briefly mentioned, but its constitutionality was not discussed. *Id.* p. 11511. The House concurred in the amendment, but the conferees' exemption of retired officers from military jurisdiction (S. Doc. 526; H. R. Rep. 1091, both 64th Cong., 1st sess.) caused President Wilson to veto the entire appropriation act (H. Doc. 1334, 64th Cong., 1st sess.).

After the veto message was read, a new bill without the Articles of War was introduced and passed. 53 Cong. Rec. 12845, 12983, 12993. In the Senate, the Articles of War (with the President's objection obviated) were once more added as a committee amendment. 53 Cong. Rec. 13036-13042. This time the House concurred *in toto*. *Id.* at p. 13208.

⁴⁰ *Ex parte Jochen*, *Hines v. Mikell*, both *supra*, note 30; *Ex parte Weitz*, *supra*, note 32. These are adverted to in Point III, pp. 12-16, of Respondent's Brief in *Kinsella v. Krueger*, No. 713.

Ex parte Falls, 251 Fed. 415 (D.N.J.). None of the five therefore involves court-martial jurisdiction over civilians in time of peace.

In 1920, AW 2(d) was reenacted without change, and, beginning in 1941, court-martial jurisdiction thereunder was in fact widely exercised over civilian camp followers abroad, both before and after the United States' entry into World War II; as the June 1945 enumeration at 4 Bull. JAG 223-229 shows.

The 1941 cases there listed accordingly represent the first American instances of trials of civilians by court-martial in time of peace that had the approval of the military reviewing authorities. The "history" that appellant invokes (U. S. Br. 32) is thus of extremely recent origin. And, as has been shown, all of such cases that later came before the civil courts either involved offenses committed after December 8, 1941, and before the proclaimed end of hostilities on December 31, 1946 (61 Stat. 1048),⁴¹ or else arose in occupied territory, where, as is pointed out below, pp. 73-76, there existed an independent basis for the exercise of court-martial jurisdiction.⁴²

Again, none of these cases discusses or throws any light on the exercise of court-martial jurisdiction in time of peace in non-occupied territory.

The partial revision of the Articles of War in 1948 involved no change in AW 2(d), and the leading case thereunder, *Madsen v. Kinsella*, 343 U. S. 341, arose in occupied Germany.

Then, in 1950, Congress reenacted and broadened court-martial jurisdiction over civilian camp followers in time of peace through the enactment of Art. 2(11), UCMJ.

⁴¹ *In re Berne*, *Perlstein v. United States*, *In re DiBartolo*, *McCune v. Kilpatrick*, *United States v. Shilman*, all *supra* note 31.

⁴² *United States ex rel. Mabley v. Handy*, *Grewe v. France*, both *supra*, note 34.

(*infra*, p. 125), the provision now at issue. But nowhere in all the voluminous legislative history of the Uniform Code of Military Justice is there a single expression, from any source, that reflects so much as a glimmering awareness of any constitutional problem.

(a) The Committee Reports on Art. 2(11)—(H. R. Rep. 491, p. 11; Sen. Rep. 486, pp. 7-8; both 81st Cong., 1st sess.)—say nothing of any constitutional issue, and the Conference Report (H. R. Rep. 1946, 81st Cong., 2d sess.) does not mention Art. 2(11).

(b) The hearings are similarly devoid of notification by anyone that a constitutional issue lurked in Art. 2(11). Neither the witness who told the House Committee that "I don't think, gentlemen, it has been in accordance with the tenets of the Constitution that the civilians should be subject to the military,"⁴³ nor the one who testified before the Senate Committee that "The framers of the Constitution recognized that civilians should be tried by civilian courts and they established a military system of courts for the Army and Navy,"⁴⁴ can fairly be considered to have advised these bodies that they were being asked to enact a statute that Winthrop and successive Judge Advocates General of the Army had considered unconstitutional (*supra*, pp. 39-41).

The bulk of the criticism of Arts. 2(11) and 2(12) as originally drafted was that they might be in conflict with international law (House Hearings, pp. 811, 817; Senate Hearings, p. 266), and it was this which led to the committee amendment that added the clause, "Subject to the provisions of any treaty or agreement to which the United

⁴³ *Uniform Code of Military Justice*, Hearings before a Subcommittee of the Committee on Armed Services, House of Representatives, 81st Cong., 1st sess., on H. R. 2498, p. 768.

⁴⁴ *Uniform Code of Military Justice*, Hearings before a Subcommittee of the Committee on Armed Services, U. S. Senate, 81st Cong., 1st sess., on S. 857 and H. R. 4080, p. 256.

States is or may be a party or to any accepted rule of international law", which now introduces both provisions. 95 Cong. Rec. 5722, 5742; 96 Cong. Rec. 1294, 1295-1296.

(c) Apart from the discussion over the necessity for the "Subject to" clause to prevent international complications, the debates on Articles 2(11) and 2(12) concerned only scope and policy. Senator McCarran questioned the broad scope of Art. 2(11) and therefore sought, though without success, to have the pending bill referred to the Judiciary Committee (96 Cong. Rec. 1366-1368, 1412-1413, 1417). Senator Morse inserted in the *Record* a law review article that objected to Art. 2(11) on the view that it would subject civilians on Guam to trial by court-martial (96 Cong. Rec. 1435).

But again there was no mention whatever of the long line of Winthrop-Judge Advocate General rulings to the contrary (*supra*, pp. 39-41), and not one whisper, from any lawyer member in either house, to the effect that Art. 2(11) might involve a constitutional issue. Not only was there no objection on constitutional grounds, there was not even the expression of a constitutional doubt. It is therefore a fact that neither the expertise of the "eminent committee of experts", nor the "full consideration" by Congress, on both of which appellant relies (U. S. Br. 37), extended to a consideration of the constitutional scope of the court-martial power.

"It is not to be lightly supposed", wrote Judge Moore in the *Krueger* case (R. 18, No. 713), "that Congress would enact such an important bit of legislation as that which we have under consideration without a careful inquiry into the scope of its own Constitutional power." It is not lightly to be supposed, true enough, but in this instance it happens to be the documented fact that, in 1916 and again in 1950, when Congress purported to confer on courts-martial jurisdiction over civilians in non-occupied territory in time of peace, it not only made no inquiry

whatever into the scope of its constitutional power, it was not even aware that inquiry was necessary.

"It is not probable that in any session [of Congress]," wrote Judge Moore (R. 18, No. 713), "there should be a dearth of members who are themselves expert in the field of Constitutional law." But, again, it is the documented fact that Congressional expertise in the constitutional realm did not include the scope of the court-martial power, and that no member and no witness pointed to the pronouncements of the worthies of old in that specialized field.

Here again, the considerations that appellant now puts forward (U. S. Br. 37-39, 47-48) to justify military jurisdiction over civilians, considerations based on world events, American military commitments, and the like, however persuasive these may appear on their face, were never, as the extensive legislative history of the Uniform Code demonstrates, articulated by any witness before either Committee, or by any member of either House anywhere. Everyone took the validity of AW 2(d) for granted; no one remembered, or cared to inquire, what the earlier constitutional views had been; and the discussions of Arts. 2(11) and 2(12) accordingly were limited to matters of coverage. The rationalizations now formulated by the appellant were simply not in anyone's mind while the Code was under consideration.

This Court had no hesitation in striking down Art. 3(a), UCMJ, the constitutionality of which was fully discussed in the course of the legislative process, and which, certainly as applied to particular offenses, had been on the books for over ninety years, since 1863. *Toth v. Quarles*, 350 U. S. 11, 20-21. There should accordingly be no feeling of reluctance in disposing of the (at least) equally invalid Art. 2(11), concerning which no one was even sufficiently informed to express a doubt or ask a question, which, in its substance, had been enacted only in 1916, and which prior to 1941 was never applied to persons in appellee's

status, viz., civilians in non-occupied territory in time of peace.

D. Dependent Wives Are No More a "Part" of the Armed Forces Abroad Than They Are in the United States

1. What this Court said in *Toth v. Quarles*, 350 U. S. at 15, bears repetition here:

"For given its natural meaning, the power granted Congress 'To make Rules' to regulate 'the land and naval Forces' would seem to restrict court-martial jurisdiction to persons who are actually members or part of the armed forces."

Obviously appellee here was not a member of the armed forces. It is equally clear that she was no "part" of the armed forces, and in the related case of *Dorothy Krueger Smith*, Judge Moore so held specifically (R. 19, No. 713): "I reject the contention of counsel for respondent that a civilian in Mrs. Smith's situation is 'part' of the armed forces."⁴⁵ Indeed, but for appellant's vehement insistence that every dependent service wife abroad is a "part" of the armed force of which her husband is a member, one would have deemed the point too clear for argument.

The fact of the matter is that, except in a rhetorical sense, and except in the sense that the garrulous service dowager identifies herself with the uniform in prattling about "When we were lieutenants", a dependent wife has never been a part of any armed force, and has never been so considered. Law and practice combine with ordinary good sense and the common usage of English speech in rejecting appellant's contention to the contrary.

⁴⁵ Yet Judge Moore nonetheless went on to sustain court-martial jurisdiction over Mrs. Smith on the basis of the Necessary and Proper Clause—in the face of this Court's holding that that clause did not enlarge the grant of court-martial jurisdiction (350 U. S. at 21-23), and in the face of the passage quoted in the text.

2. For well-nigh 175 years after Washington took command of the Continental forces at Cambridge and thus created the United States Army, no wife of any American soldier was ever tried by court-martial. The civilians subjected to military law by the Continental Articles of War of 1775 and 1776 (*supra*, p. 43) all had some functional connection with the forces that were fighting for independence, and it is not of record that, when Martha Washington visited her husband at the Headquarters of those forces at Valley Forge and at Morristown (4 Freeman, *George Washington*, 412, 581, 624), she was ever considered to have subjected herself thereby to trial by court-martial.⁴⁶

Indeed, when Winthrop completed the last edition of his immortal treatise, after devoting some thirty-five years to the administration and the study of military law, the only case that he could find where a wife had been tried by court-martial as a camp follower originated in the British Army in India in 1825, and there the woman concerned had been characterized as a "wife or reputed wife."

⁴⁶ In the *Burney Appendix*, p. 41, it is asserted that Washington "stated that women of the camp follower description should be either turned out of camp or arrested for trial and punishment", citing 10 *Writings of Washington* 421.

The reference is to Washington's General Orders at Valley Forge, Feb. 4, 1778; this is what they actually provide:

"The most pernicious consequences having arisen from suffering persons, women in particular to pass and repass from Philadelphia under Pretence of coming out to visit their Friends in the Army and returning with necessaries to their families, but really with an intent to intice the soldiers to desert; All officers are desired to exert their utmost endeavors to prevent such interviews in future by forbidding the soldiers under the severest penalties from having any connection with such persons and by ordering them when found in camp to be immediately turned out of it.

"If any of them appear under peculiar circumstances of suspicion they are to be brought to immediate trial and punishment, if found guilty."

Plainly, these were not camp followers; and the Index to the *Writings of Washington* discloses no trial of dependent wives by any Continental Army court-martial.

(Winthrop, *133; reprint, p. 99).⁴⁷ "In any event", as the Solicitor General told this Court in *Madsen v. Kinsella* (U. S. Br., No. 411, Oct. T. 1951, pp. 44-45), "the status of the wife or alleged wife of an English soldier in India in 1825 has little bearing as to whether the wife of an American soldier was regarded as subject to court-martial jurisdiction then or later."

American practice did not change after Winthrop wrote. Again to quote the Solicitor General's *Madsen* brief (supra, pp. 44, 45), "Petitioner's contention that the wives of soldiers were subject to trial by court-martial prior to 1916 under the former AW 63 is inconsistent with the terms and construction of that article * * *. Neither the petitioner nor the respondent has found any case of a wife or other dependent of a soldier who was tried by an American court-martial prior to the revision of the Articles of War in 1916."

Nor did American participation in two global wars effect a change. In June, 1945, The Judge Advocate General of the Army compiled a long list of instances of civilian camp followers tried by court-martial under AW 2(d) and its analogues. 4 Bull. JAG 223-229. In every instance there noted, the civilian subjected to military jurisdiction had had some fairly obvious connection with the Army. In no instance there noted had any dependent wife been tried by court-martial.

Certainly all of the foregoing is compelling evidence that American military lawyers did not consider dependent wives to be a "part" of the armed forces and

⁴⁷ Quoted at U. S. Br. 34, n. 16. The reference therein to Hough, *Precedents in Military Law* (London 1855) 629 is to the case of a wife who in 1831 was sent to the Supreme Court of Calcutta; and who was discharged when the grand jury found no true bill; her triability by court-martial has only the authority of the compiler's say-so. However, it should be noted that, at this time, there was a special Mutiny Act applicable to India. St. 4 Geo. IV, ch. 81.

subject to trial by court-martial simply because they were accompanying their husbands.

Indeed, it is recorded that, in 1947, after the declared end of World War II hostilities, The Judge Advocate General of the Army made a policy decision that military jurisdiction over such dependents [i.e., wives and children of service personnel] would not be exercised in spite of the fact that they were 'accompanying' . . . the armies of the United States without the territorial jurisdiction of the United States'.⁴⁸ Aycock and Wurfel, *Military Law under the Uniform Code of Military Justice* (1955) 60. Not until 1950 was the good name of the United States Army sullied by the court-martial of an unarmed dependent wife—and even then the trials took place in occupied territory where, see pp. 73-76 *infra*, the court-martial was functioning as a military government court.⁴⁹

Indeed, the strangest aspect of this and its companion case, No. 713, is that the reversal of the traditional policy with respect to the treatment of dependent wives has actually taken place under color of the Uniform Code of Military Justice—the act by which Congress sought to meet and dispose of continuing criticisms of the administration of military justice. Thus there is presented this unedifying paradox, that whereas for nearly 175 years no civilian wife of an American serviceman was ever tried by an American court-martial, now, in consequence of a reformed procedure and jurisdiction evoked by persisting

⁴⁸ "In case number 340593 Audrey L. Aguaya, a dependent wife, was tried in Japan on 10 February 1950 on a charge of larceny, committed in December 1949. She was convicted and sentenced to six months confinement, which was suspended. In case number 351230, Fumie Okitsu Hilton, a dependent wife, was tried at Osaka, Japan, on 18 January, 1952 for unlawful possession of drugs, an offense committed 11 December 1951. Upon conviction she was fined \$100, and sentenced to three months confinement, which was suspended." Respondent's reply brief in *United States ex rel. Krueger v. Kinsella*, II, C. No. 1726, S. D. W. Va., at p. 7. Even casual reading between the lines strongly suggests that both trials were on an *in terrorem* basis.

criticism of military trials of persons in uniform, civilian wives are not only being tried by court-martial, but the practice is defended as necessary, as proper, and (U. S. Br. 29, 31) as an element of service morale!

3. *Madsen v. Kinsella*, 343 U. S. 341, insofar as it spoke of the concurrent jurisdiction of a general court-martial to try Mrs. Madsen, was dictum, but, in view of the military government powers of such a tribunal (*infra*, pp. 73-76), was dictum irrelevant here. On the further issue of the camp-follower jurisdiction conferred by AW 2(d), the case seems not to rise even to the level of dictum.

All the court said on the latter point was that Mrs. Madsen fell within the terms of AW 2(d).⁴⁹ But the constitutionality of AW 2(d) as applied to civilian wives in time of peace, the critical question here, was not even mentioned. Indeed, far from attacking the validity of AW 2(d), Mrs. Madsen was urging that she could only have been tried by court-martial. Thus the issue that is in this case was not presented there, much less contested, with the result that *Madsen v. Kinsella* is to that extent valueless as a precedent; it did not present an earnest controversy on the point. *Gaines v. Relf*, 12 How. 472, 537-538, 539 (6th).

4. It is true that the legislative history of Art. 2(11), UCMJ, reflects at least some expression of intention to subject dependent wives to trial by court-martial. House Hearings, pp. 876-877, quoted at U. S. Br. 39-40; 96 Cong. Rec. 1357.⁵⁰ But since the constitutional issue was not

⁴⁹ Possibly this disposed of the doubt expressed on that issue by the Fourth Circuit below, 188 F. 2d at 274-275.

⁵⁰ "MR. KEM. I should like to ask a question in regard to subsection (11) of Article 2, to which the Senator has just made reference. * * * Am I correct in interpreting subsection (11) to mean that a wife who accompanies her husband, who is a member of the

mooted, let alone explored, that circumstance can scarcely be deemed weighty, least of all when it is borne in mind that every other camp follower tried by court-martial had some obvious functional connection with the military.

5. All of the civilian camp followers who were tried by court-martial through June 1945, had, as was noted above, p. 62, some functional connection with the Army (4 Bull. JAG 223-229), and the same is true of those whose cases came before the civil courts.⁵¹

In time of peace, however, not even clear functional connection with the forces is sufficient to confer court-martial jurisdiction over civilians, as the instance of the post trader demonstrates (*supra*, pp. 45-47). And when Congress by Sec. 16 of the Act of July 17, 1862, c. 200, 12 Stat. 594, 596, attempted to subject civilian contractors

armed forces, to a point outside the continental limits of the United States, would be subject to this code?

"MR. KEFAUVER. If a wife accompanies her husband outside the continental limits of the United States and outside the Territories listed in subsection (11), * * * she will be subject to the uniform code as presented in this bill, just as she is subject to the military code today."

⁵¹ *Gerlach*, *supra* note 30 (mate on Army transport); *Falls*, *supra* note 30 (cook on Army transport); *Mikell*, *supra* note 30 (auditor in constructing quartermaster's office); *Jochen*, *supra* note 30 (quartermaster employee); *Berue*, *supra* note 31 (seaman on ship carrying supplies for Army); *Perlstein*, *supra* note 31 (air-conditioning mechanic ashore in connection with salvage operations in harbor); *DiBartolo*, *supra* note 31 (aircraft mechanic); *McCune*, *supra* note 31 (cook on Army transport); *Shilman*, *supra* note 31 (merchant seaman; fine imposed by court-martial not sustained); *Weitz*, *supra* note 32 (employee of civilian contractor; military jurisdiction not sustained); *Walker*, *supra* note 32 (engineer employee in Panama; military jurisdiction not sustained); *Mobley*, *supra* note 34 (post exchange employee); *Grewe*, *supra* note 34 (mechanical engineer with Army engineers); *Rubenstein*, *supra* p. 50 (status unclear; remanded for more precise determination).

Probably the most tenuous functional connection with the forces was in *Perlstein*, where certiorari was granted. But, as is pointed out above, p. 34, the termination-of-jurisdiction feature of the case may have been a more decisive factor in obtaining review.

furnishing supplies to the Army to trial by court-martial, the measure was held unconstitutional. *Ex parte Henderson*, Fed. Case No. 6349 (C.C.D.Ky.).⁵² Yet, if direct connection with the forces is to be the criterion, then obviously contractors and even post traders are more directly connected with the maintenance of an armed force than are the wives of any of its members.

6. The fallacy in appellant's argument that a dependent wife's presence abroad and her enjoyment of military amenities somehow subjects her to military trial will be more readily apparent if it be supposed that appellee had simply been sent to Hawaii. For if "Hawaii" is substituted for "England" and appropriate substitutions are made elsewhere, then appellant's position is this (U. S. Br. 31):⁵³

"Appellee was *in Hawaii*, because her husband, a member of the United States Air Force, was sent *to Hawaii* in fulfillment of American military commitments and because the American military authorities had determined that it furthered the morale of the armed forces stationed *in Hawaii* to permit their families to accompany them. * * * Plans for and the cost of her transportation to *Hawaii* had been arranged and provided by the Air Force. She travelled by military surface transport. After arrival in *Hawaii*, appellee and her husband were assigned public quarters and she was issued appropriate authorization for commissary and post exchange privileges. She was accorded the use of, and did use, military medical facilities (R. 31)."

Is a dependent wife in Hawaii so intimately a part of the Air Force there so as to be subject to trial by court-

⁵² This ruling is erroneously attributed to 1878 at 11 Fed. Cas. 1067. In fact, see Winthrop *143, *145 (reprint, pp. 105, 106), the decision was rendered in 1866. The editors of the Federal Cases appear to have confused the date of the decision with the date that the opinion was certified by the Clerk of the court, 11 Fed. Cas. at p. 1078.

⁵³ Substituted words are italicized.

martial? Her relationship is just as close—and just as distant—as appellee's was to the Air Force while in England, or, for that matter, precisely the same as the relationship to the armed forces of any dependent wife on any military, naval, or air installation within the United States.

Such a dependent wife would be transported to any station in the continental United States at public expenses and, when necessary or appropriate, by military transportation. And all of the military amenities afforded appellee in England, on which such stress is laid—public quarters, commissary and post exchange privileges, military medical facilities—were and are equally available to every Air Force wife who accompanies her husband to Bolling Air Force Base and lives with him there.⁵⁴

It is said (U. S. Br. 31-32) that "In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described in Article 2(11) are part of the American military contingent abroad." Possibly in the eyes of the civilian community, and of the editor of the society page of the newspapers, the wives of the officers quartered at Fort Myer, at the Naval Gun Factory, and at Bolling Air Force Base, are part of the "service set" and so, figuratively, a part of the armed forces. But that figure of speech hardly subjects them to trial by court-martial.

Thus appellant's contention that court-martial jurisdiction can be exercised over accompanying civilians must rest, not on the emoluments they receive, but on one of two propositions: Either such civilians lose constitutional protections when they go overseas, or else the court-martial

⁵⁴ See, for an authoritative listing of the benefits available to Air Force dependents, Air Force Manual 34-4, *Personal Affairs of Air Force Personnel and Aid to Their Dependents*. To the extent that facilities are available, no distinction is drawn between dependents in the United States, or in its overseas possession, or in foreign countries.

power expands when it is exerted away from home. Those matters are discussed below, pp. 81-86.

7. Here the immediate point to be considered is appellant's proposition that marriage to a man in uniform makes a woman a part of his armed forces, a proposition that is repeated several times in several ways (U. S. Br. 31-32, 39; 43, 47), apparently in the hope that repetition, like advertising, will, if indeed it does not convince the reader, somehow overwhelm him in the end.

In actual fact, this appellee, a young dependent wife, the mother of two small children already born and carrying a third (*supra*, p. 4), was no more a part of the United States Air Force than if she had been quartered on any Air Force Base in the United States. And appellant's continued, intensified effort to torture constitutional provisions through the reiteration of rhetorical hyperboles requires a second invocation of Mr. Justice Holmes' admonition: "As long as the matter to be considered is debated in artificial terms there is a danger of being led by a technical definition to apply a certain name, and then to deduce consequences which have no relation to the grounds on which the name was applied." *Guy v. Donald*, 203 U. S. 399, 406.

In 1952, the Solicitor General advised this Court in the *Madsen* case (U. S. Br., No. 411, Oct. T. 1951, p. 51), "The compelling reasons of policy which preclude subjecting soldiers of the occupying forces to the law and tribunals of the occupied territory have much less weight when applied to civilians of the occupying power, particularly those, such as soldiers' dependents, who bear no functional relationship to the occupying troops."

Nowhere in any of the passages setting forth reasons why dependent wives must now be tried by court-martial (U. S. Br. 31-32, 37-39, 42-43, 47-48) does appellant even attempt to explain how and wherein the international situation has so deteriorated since 1952 as to require a

complete reversal of the position that the Government then presented to this Court on the precise question now in issue.

No such explanation, it is submitted, could be furnished. A hundred and seventy-five years of unbroken American precedent are conclusive in denying that the wife of a soldier is a part of the Army. On this point history is at one with logic and experience alike. It follows that a dependent wife may not be tried by court-martial in time of peace. *Toth v. Quarles*, 350 U. S. 11, 15.

E. The Power to Try Civilians by Court-Martial in Occupied Territory Rests on the War Power and on a Statute Giving General Courts-Martial the Powers of Military Government Tribunals, and So Cannot Justify Such Trials in Non-Occupied Territory, as in the Present Case

Appellee's "curt dismissal" (U. S. Br. 44) of *Madsen v. Kinsella*, 343 U. S. 341, and of similar decisions sustaining the jurisdiction of courts-martial over civilians in occupied territory was and is based on the recognition that such trials rest, first, on the war power (Clause 11 of Section 8, Article I) and, second, on the statutory provisions giving to general courts-martial all the powers of military government courts (AW 12 of 1916, 1920, and 1948; Art. 18, UCMJ; *infra*, pp. 124, 125).

Appellant's argument under this heading (U. S. Br. 30, 42-45, 48) reflects a confusion engendered by his failure to appreciate the constitutional basis for military occupation of enemy territory as well as by his overlooking the controlling statutory provision involved. His reliance on the *Madsen* case (U. S. Br. 41-45), and particularly his statement (U. S. Br. 43) that "it would be hard to say whether the difficulties of dealing with a prostrate Germany prior to a formal declaration of peace presented a more or less fitting occasion for application of the war power than did the continuing tensions of war and threatened war which formed the background and basis for Mrs. Covert's

sojourn in England", strongly suggest that it would be helpful to review the basis and the scope and the consequences of the war power, in order to dispel the verbal fog which surrounds those matters in appellant's brief.

1. Even in domestic territory, the war power has the broadest kind of scope. The power granted Congress by Clause 11 of Article I, Section 8, "To declare War", is, as this Court has said, "a power to wage war successfully and thus it permits the harnessing of the entire energies of the people in a supreme cooperative effort to preserve the nation." *Home Bldg. & Loan Ass'n v. Blaisdell*, 290 U. S. 398, 426; *Hirabayashi v. United States*, 320 U. S. 81, 93.

And the decisions of this Court establish the well-nigh transforming sweep of the war power, with respect to the evacuation of citizens (*Hirabayashi v. United States*, *supra*; *Korematsu v. United States*, 323 U. S. 214); with respect to limitations on the exercise of normal property rights (*Yakus v. United States*, 321 U. S. 414; *Bowles v. Willingham*, 321 U. S. 503), even after the close of hostilities (*Woods v. Miller Co.*, 323 U. S. 138); with respect to the non-compensability of property destroyed by the United States in the course of military operations (*United States v. Caltex*, 344 U. S. 149); and with respect to the subjection of individuals regardless of citizenship, to trial by military tribunals on American soil for violations of the law of war (*Ex parte Quirin*, 317 U. S. 1; *In re Yamashita*, 327 U. S. 1).⁵⁵

All of these cases uphold governmental acts that would not possibly have been valid in time of peace; all are therefore authority for the vast and vital distinction under our Constitution between war and peace.

⁵⁵ Although Yamashita was tried in the Philippines, those islands were then still under the American flag, and the ruling brought here for review was that of the Supreme Court of the Commonwealth of the Philippines.

2. The war power is also the source of the President's power as Commander-in-Chief to deal with occupied territory. *Cross v. Harrison*, 16 How. 164; *Leitensdorfer v. Webb*, 20 How. 176; *Santiago v. Noguera*, 214 U. S. 260; *Alvarez y Sanchez v. United States*, 216 U. S. 167. During the Civil War, in which the South was accorded belligerent rights; the same power was exercised in those portions of the Confederacy under Union control. *The Grapeshot*, 9 Wall. 129; *Burke v. Miltenberger*, 19 Wall. 519; *New Orleans v. Steamship Co.*, 20 Wall. 387; *United States v. Dickelman*, 92 U. S. 526. On occasion, as when the British occupied a part of Maine in 1814, the United States has been on the other side of military government. *United States v. Rice*, 4 Wheat. 246. And within the past decade there has been a striking illustration of the duty of the military occupant as a matter of international law to maintain public order in the territory that he occupies. *In re Yamashita*, 327 U. S. 1, although the existence of that duty had long been recognized by this Court. *The Grapeshot*, 9 Wall. 129, 132-133; *Neely v. Henkel*, 180 U. S. 109, 121.

But the significant point—which appellant (U. S. Br. 43, quoted *supra*, pp. 69-70) obviously misses—is that whereas the military occupant under the war power acts regardless of and against the will and indeed the armed force of the occupied power, since he proceeds by right of conquest (*MacLeod v. United States*, 229 U. S. 416), the stationing of troops in the territory of another friendly power requires the latter's consent. Thus here, as well as in Japan after the Treaty of Peace became effective in 1952 (see discussion at pp. 11-12 of Respondent's Brief in No. 713), American forces were not stationed abroad by right of conquest under the war power.

3. It is also imperative to recall that when the United States proceeds to occupy enemy territory under the war power, Americans whose persons or property are found in territory so occupied are, normally and usually,

accorded only the rights of other inhabitants of such territory. Thus it is well settled that American property found in occupied enemy territory so far partakes of enemy character that the American owner is not entitled to compensation when it is taken by the United States. E.g., *Juragua Iron Co. v. United States*, 212 U. S. 297, 305-306; *Miller v. United States*, 11 Wall. 268; *The Venus*, 8 Cranch 253. And an American present in occupied territory is subject to trial by a non-jury tribunal established by American military government. *Madsen v. Kinsella*, 343 U. S. 341; *Neely v. Henkel*, 180 U. S. 109.

Accordingly, when a statute so provides, an American who commits an offense in territory occupied by the United States can be extradited to such territory, there to be tried by a military government tribunal. *Neely v. Henkel, supra*. The reason is that he is being tried for a violation of foreign law (*Madsen v. Kinsella, supra*, 343 U. S. at 356). Thus, Mrs. Madsen was tried, although by an American military government tribunal, for a violation of the German Criminal Code (343 U. S. at 342-343, 344), while Neely was extradited to face a similar tribunal for violations of the Penal Code of Cuba that had been in force from Spanish days, as well as for transgressing provisions of the Postal Code promulgated by the American military governor (180 U. S. at 112-113, 118-119). Neither had, under the law of Germany or Cuba, any right to a jury, even though such law was being administered by the United States for the time being in the exercise of its war power. The statute providing for extradition to occupied territory is permanent legislation, now 18 U. S. C. § 3185, but when the occupation ceases, the war power no longer operates, and the right to extradite also ceases. *In re Kraussman*, 130 F. Supp. 926 (D. Conn.).

Thus, when an American citizen goes into territory that is under American occupation, he so far becomes an inhabitant of that territory as to subject his property to seizure, and his person to non-jury trial. *Miller v. United*

States, 11 Wall. 268, 305-306; *Jyragua Iron Co. v. United States*, 212 U. S. 297; *Neely v. Henkel*, 180 U. S. 109; *Madsen v. Kinsella*, 343 U. S. 341. The United States is military sovereign there. Plainly, no such consequences follow simply because, with the consent of the foreign nation, American troops and their dependents are stationed in that nation's territory.

Nor does it follow that the power to extradite to occupied territory for trial by a military tribunal there (*Neely v. Henkel*, 180 U. S. 109) is equivalent to a power to try by military tribunal in the United States without such extradition. Such a contention would be on a par with an argument that, simply because the United States has an extradition treaty with say, Turkey, the person to be extradited could be tried in the United States by Turkish law under such personal guarantees as that law affords.

4. So much for constitutional background. It remains to consider the Congressional scheme of implementing the judicial powers of the United States in its capacity as a military occupant, and to illuminate what appellant has wholly neglected to consider.

Ever since 1916, an Army general court-martial has had, in addition to its powers to try persons subject to military law, jurisdiction to try "any other person who by the law of war is subject to trial by military tribunals." AW 12 of 1916; AW 12 of 1920; AW 12 of 1948 (*infra*, p. 124); see *Madsen v. Kinsella*, 343 U. S. at 350-352. An identical provision applying to all of the armed services is now in force as Art. 18, UCMJ, *infra*, p. 125.

Consequently, any trial by court-martial of an accompanying civilian can, if such trial takes place in occupied territory, even after the cessation of hostilities, be justified as an exercise of the war power, and specifically of so much of that power as Congress has by statute conferred upon courts-martial. It is this principle, not the

much broader proposition advanced by appellant (U. S. Br. 41 *et seq.*) that explains *Madsen v. Kinsella* and his other occupied territory cases (*supra* note 34). It is this principle for which the President's power as Commander-in-Chief (U. S. Br. 48, n. 26) can alone be properly invoked. It is likewise this principle that supports numerous cases wherein the Court of Military Appeals sustained court-martial jurisdiction over civilians in occupied territory.⁵⁶ And it is this same principle that fully sustains the dictum in *Madsen v. Kinsella*, 343 U. S. at 343, 351-355, 365-366, that there was concurrent jurisdiction in an Army general court-martial to try Mrs. Madsen in occupied Germany: Such a court-martial could have tried her as a military tribunal under the law of war, viz., a military government court, under AW 12 of 1948 (now Art. 18, UCMJ), and therefore had full and complete constitutional jurisdiction pursuant to that provision.⁵⁷

It would be possible to argue that the power to punish offenses committed by civilians in occupied territory is an exercise of the power conferred by the concluding portion of the Piracy Clause, Clause 10 of Article I, Section 8, "To define and punish * * * Offences against the Law of Nations." There is language in *Ex parte Quirin*, 317 U. S. 1, 27, which is perhaps susceptible to that interpretation if the expression, "law of war", is broadly construed—though the present problem was assuredly not then before the Court.

But, whether the punishment of crimes committed by civilians present in occupied territory is properly listed under Clause 10, or whether it is more appropriately classified under the War Power, Clause 11, it is in any

⁵⁶ *United States v. Marker*, 1 USCMA 393, 3 CMR 127; *United States v. Schultz*, 1 USCMA 512, 4 CMR 104.

⁵⁷ Insofar as the dictum dealt with the powers of the court-martial under AW 2(d) of 1916 and thereafter (now Art. 2(11), UCMJ), it was dealt with above, p. 64.

event certain that the military trial of civilians in occupied territory is not, as appellant seems to think (U. S. Br. 30, 42-45, 48), an exercise of the Clause 14 power "To make Rules for the Government and Regulation of the land and naval Forces." It could not be. The power over occupied territory is limited only by accepted principles of international law, by the generally accepted standards of civilized nations (e.g., *New Orleans v. Steamship Co.*, 20 Wall. 387, 393-394), while the power to govern the armed forces is a branch of municipal law, and thus varies in the details of its application from country to country, according to each nation's laws and constitution (if any). See Chase, C. J., in *Ex parte Milligan*, 4 Wall. 2 at 141-142. Moreover, the power to govern the armed forces is a power that can always be exercised, in time of piping and perfect peace as well as in time of war, at home as well as abroad, in friendly as well as occupied territory; while the war power, certainly in its aspect of abridging individual rights, is restricted to time of war, and to occupied territory.

True, as appellant says (U. S. Br. 45), "formal war does not exhaust the occasions for the exercise of the war power." It may be invoked to construct facilities before a war (*Ashwander v. TVA*, 297 U. S. 288), to retain after a war the property of alien enemies seized during its pendency (*Silesian-American Corp. v. Clark*, 332 U. S. 469), and to memorialize a war long after it is over (cf. *United States v. Gettysburg Elec. R. Co.*, 160 U. S. 668). But it has never been suggested, at least prior to the time that the present case arose (U. S. Br. 45), that the power to try civilians by court-martial in time of war and in conquered territory likewise sustains a similar jurisdiction in time of peace and not in occupied territory.

Appellant's argument (U. S. Br. 42-43, 64) that blandly analogizes the unquestioned power to try civilians in occupied Germany (*Madsen v. Kinsella*, 343 U. S. 341) and in occupied Cuba (*Neely v. Henkel*, 180 U. S. 109) with the

asserted power to similarly try civilians within the territory of friendly receiving powers, England in this case and Japan in that of *Mrs. Smith (Kinsella v. Krueger, No. 713)*, not only reflects an utter unawareness of international law as expounded by this Court for more than a century, it also blurs the transcendent distinction between peace and war that, as has been shown above, pp. 70-73, is so fundamental in the Constitution of the United States.

Since, then, the war power does not sustain the asserted jurisdiction, where does it rest? Are there any other clauses that support it? Appellee turns to a consideration of those questions: The scope of the Fifth Amendment, the extent to which the Bill of Rights is operative overseas, and the question whether the court-martial power expands when it passes the national boundaries.

F. Nothing in the Fifth Amendment Enlarges the Grant of Court-Martial Jurisdiction Contained in Article I of the Constitution

As has been seen, pp. 52-60, *supra*, the constitutionality of extending court-martial jurisdiction to overseas civilians in time of peace was never questioned, either in 1916 or in 1950. And the most likely explanation for the veritable anesthesia that overcame all concerned is that it was simply assumed without question that, since the resultant trials were "cases arising in the land or naval forces" within the Fifth Amendment, they had a constitutional basis. Inquiry into the inarticulate premises underlying this assumption requires reexamination of the ground covered in *Toth v. Quarles*, 350 U. S. 11, which disposed of all attempts to recapture a military jurisdiction once lost by change from military to civilian status.

The earliest recapture provision was that contained in Section 2 of the Act of March 2, 1863, c. 67, 12 Stat. 696, 697, which was first codified as AW 60 of 1874 and AGN

14 (Eleventh): it purported to authorize the trial by court-martial of discharged or dismissed personnel in certain cases of fraud. In time it became, on the Army side, AW 94 of 1916, 1920, and 1948, and eventually it was made applicable to all of the armed forces in all serious cases beyond the jurisdiction of civilian tribunals as Art. 3(a), UCMJ.

Notwithstanding the doubts expressed by Winthrop (*144-146; reprint pp. 105-107), the constitutionality of these provisions was long upheld by the lower federal courts. Their reasoning was that, although the accused had become an ex-soldier, ex-sailor, or ex-airman, and so was a civilian at the time of trial, his case arose while he was still in uniform, with the consequence that he fell within the exception to the guarantee of indictment by grand jury in the Fifth Amendment, viz., "except in cases arising in the land or naval forces." See *In re Bogart*, 2 Sawy. 396, Fed. Case No. 1596 (C.C.D.Calif.); *Kronberg v. Hale*, 180 F. 2d 128, 130 (C.A. 9), certiorari denied, 339 U. S. 969; *Talbott v. United States ex rel. Tóth*, 215 F. 2d 22, 26 (D.C.Cir.) (the *Toth* case below).

A similar rationale was relied on in the rulings sustaining court-martial jurisdiction over discharged soldiers held in military prisons (16 Op. Atty. Gen. 292; *In re Craig*, 70 Fed. 969 (C.C.D.Kan.), relying on *In re Bogart, supra*). So too, the *Manual for Courts-Martial*, for many years and through many editions published under different auspices, pointed to the Fifth Amendment as a source of military jurisdiction. See MCM, 3d ed. 1893, by Lt. Murray of the Artillery, p. 2; the following editions, all published by the War Department: 1895, p. 4; 1901, p. 6; 1905, p. 6; 1908, p. 6; and the following editions, prescribed by the President: 1917, ¶ 1; 1921, ¶ 1; 1928, ¶ 1; 1949, ¶ 1; 1951, ¶ 1. Commentators, likewise, espoused the view that the boundary of military jurisdiction was to be found within the contours of the Fifth Amendment, their view being

that inquiry in each instance was limited to ascertaining whether the particular case had arisen in the land or naval forces. E. g., Morgan, *Court-Martial Jurisdiction over Non-Military Persons under the Articles of War*, 4 Minn. L. Rev. 79, 107.⁵⁸

This easy assumption was exploded by *Toth v. Quarles*, 350 U. S. 11, 14, where the Court specifically ruled that the Fifth Amendment "does not grant court-martial power to Congress; it merely makes clear that there need be no indictment for such military offenses as Congress can authorize military tribunals to try under its Article I power to make rules to govern the armed forces." While the foregoing appeared in a footnote; it was plainly essential to the holding, as the dissent on that point (350 U. S. at 37-42) was at pains to set forth.

A moment's reflection should suffice to establish both the correctness of the ruling on this point in the *Toth* case and the unsoundness of the prior assumption.

It is a matter of undoubted historical fact that adoption of a Bill of Rights was the price exacted by the several conventions as a condition of the Constitution's ratification, as this Court has had occasion to recognize. *Barron v. Baltimore*, 7 Pet. 243, 250. And see, for a recent study, Rutland, *The Birth of the Bill of Rights, 1776-1791* (1955), especially c. VIII, "The Great Compromise." The first Ten Amendments, plainly, were designed as limitations on the powers of the new general government; how, then, could anything in them possibly enlarge powers which the Constitution had granted to that government?

Independent research fortifies the construction of the Fifth Amendment found in *Toth v. Quarles*, 350 U. S. 11, 14.

⁵⁸ Present counsel, who expressed the same opinion (Wiener, *A Practical Manual of Martial Law* (1940) §§ 129-130), carefully refrains from casting any stones.

Massachusetts and New Hampshire, in their several instruments of ratification, proposed an amendment reading as follows (1 Elliot's *Debates* 323, 326; 2 *id.* 177):

"VI. That no person shall be tried for any crime by which he may incur an infamous punishment, or loss of life, until he be first indicted by a grand jury, except in such cases as may arise in the government and regulation of the land and naval forces."

New York's proposal was in these terms (1 *id.* 328):

"That (except in the government of the land and naval forces, and of the militia when in actual service, and in cases of impeachment) a presentment or indictment by a grand jury ought to be observed as a necessary preliminary to the trial of all crimes cognizable by the judiciary of the United States; * * *"

A slightly different formulation was offered by three other states, North Carolina (4 *id.* 243), Rhode Island (1 *id.* 334), and Virginia (3 *id.* 658):

"8. That, in all capital and criminal⁵⁹ prosecutions, a man hath a right to demand the cause and nature of his accusation, to be confronted with the accusers and witnesses, to call for evidence, and be allowed counsel in his favor, and a fair and speedy trial by an impartial jury of his vicinage, without whose unanimous consent he cannot be found guilty, (except in the government of the land and naval forces); nor can he be compelled to give evidence against himself."

Plainly, the text of the Fifth Amendment as adopted varies the language of the above proposals. That variance was not, so far as the Annals of Congress disclose, debated in the House; and the veil of the executive sessions wherein all Senate business was done in those days is not pierced by anything recorded in *The Journal of William Maclay*, as Senator Maclay went home ill on the day that

⁵⁹ In the Virginia version, these words were transposed to read "criminal and capital".

the Amendments were scheduled for Senate discussion (pp. 131, 141-142).

In an analogous situation, this Court has refused to give controlling effect, in construing the original Constitution to revisions made by the Committee on Style, where textually such revisions appeared to vary a widely held understanding. *Ex parte Grossman*, 267 U. S. 87, 113.

So here: It is hardly likely that, with six out of the original thirteen states insisting on the exception as extending to cases arising in the government of the land and naval forces, the Fifth Amendment as adopted would have conveyed to the Congress and to the States, late in the Eighteenth Century, a context that would have enlarged the grant of court-martial power so as to make it extend to any cases arising in the land and naval forces that did not involve the government of those forces. Consequently, the tenor of the several states' proposals conforms to the interpretation placed on the Fifth Amendment's exception in *Toth v. Quarles*, 350 U. S. 11, 14.

As Mr. Justice Holmes said in *Gompers v. United States*, 233 U. S. 604, 610, in words that bear constant repetition:

"* * * the provisions of the Constitution are not mathematical formulas having their essence in their form; they are organic living institutions transplanted from English soil. Their significance is vital not formal; it is to be gathered not simply by taking the words and a dictionary, but by considering their origin and the line of their growth."

The origin of the Fifth Amendment plainly shows that those who framed and adopted it never for a moment intended it to enlarge the carefully formulated grant in Clause 14 of Section 8 of Article I. "To make Rules for the Government and Regulation of the land and naval Forces." Unless, therefore, a given individual falls within the four corners of Clause 14, he—or she—cannot be sub-

jected to trial by court-martial by reason of anything contained in the Fifth Amendment.

G. The Power to Govern the Armed Forces in Time of Peace Does Not Become Any Broader Simply Because Exercised Outside the Continental Limits of the United States

Appellant argues that Winthrop and the earlier opinions of The Judge Advocate General are not controlling because, so it is said, they were dealing with cases arising in the continental United States (U. S. Br. 44-45; but see p. 42 *supra*), whereas the military jurisdiction now asserted is limited to civilians located overseas. And later appellant asserts (U. S. Br. 61-65) that the provisions of the Bill of Rights are simply not applicable to the extraterritorial jurisdiction now asserted by the United States.

Appellee has already dealt with the powers exerted by courts-martial in occupied territory where they function as military government tribunals (*supra*, pp. 73-76). Under this heading she will consider first the soundness or otherwise of the appellant's contentions that rest on extraterritoriality. That inquiry divides itself into two facets: First, is it true that an American civilian cannot invoke the Bill of Rights when faced with action by American officers overseas? Second, assuming that he cannot, so that he must stand trial in, say, an American consular court, does it follow that the court-martial power under Clause 14 has wider scope abroad, permitting it there to be applied to persons who are not, in a constitutional sense, a "part" of the armed forces?

1. Appellant (U. S. Br. 61-65; and see *Burney* Appendix, pp. 55-58) relies primarily on so much of *De re Ross*, 140 U. S. 453, decided in 1891, as states (p. 464) that "The Constitution can have no operation in another country," and on the holding of that case, which was that an American could properly be tried by an American consular court, sitting without a jury in Japan, for a murder committed

on an American ship in Yokohama harbor. Thus the Fifth and Sixth Amendments were held inapplicable.

It would be interesting to speculate whether and to what extent the language and indeed the holding of the *Ross* case, decided seven years before the United States spread beyond the limits of the American continent and when war was thought to be on the verge of disappearance,⁶⁰ is still law today. We know that, after the Insular Cases (*Di Lima v. Bidwell*, 182 U. S. 1; *Dooley v. United States*, 182 U. S. 222; *Downes v. Bidwell*, 182 U. S. 244; *Dooley v. United States*, 183 U. S. 151; *Fourteen Diamond Rings v. United States*, 183 U. S. 176) had been decided by a badly split and even fractionalized Court, it was held, with somewhat more agreement, that the guarantee of jury trial did not extend *ex proprio vigore* to newly acquired territory not incorporated within the United States where such trial had not formed a part of the new possession's ancient institutions. *Hawaii v. Mankichi*, 190 U. S. 197; *Dorr v. United States*, 195 U. S. 138; *Balzac v. Porto Rico*, 258 U. S. 298. But, even so, it was always made plain that certain basic constitutional protections followed the flag none the less. *Downes v. Bidwell*, 182 U. S. 244, 276-277 (First Amendment; right to own property); *Balzac v. Porto Rico*, 258 U. S. 298, 312-313 (Fifth Amendment).

And the trend has been markedly in favor of extending not only constitutional guarantees but also constitutional powers. The change in emphasis, with respect to the scope of constitutional protection, that separates *Hawaii v. Mankichi*, 190 U. S. 197, from *Duncan v. Kahanamoku*, 327 U. S. 304, far transcends the purely technical aspects of "incorporation." The Fifth Amendment is now held to apply in Puerto Rico of its own force (*Arroyo v. Puerto Rico Transp. Authority*, 164 F. 2d 748, 750 (C.A. 1)), and like-

⁶⁰ "The aspirations of the world are those of commerce. Moralists and philosophers, following its lead, declare that war is wicked, foolish, and soon to disappear." Holmes, *The Soldier's Faith* (1895), in *Speeches*, 56.

wise to be applicable in the Virgin Islands (*Alton v. Alton*, 207 F. 2d 667 (C.A. 3), vacated because moot, 347 U. S. 610; *Granville-Smith v. Granville-Smith*, 214 F. 2d 820 (C.A. 3), affirmed on other grounds, 349 U. S. 1), although neither possession has ever been declared an incorporated territory. The First Circuit, significantly enough, has held that the Fourth Amendment controls American officers abroad. *Best v. United States*, 184 F. 2d 131, certiorari denied, 340 U. S. 939. Treason, the only crime defined by the Constitution, can be committed by Americans abroad. *Kawakita v. United States*, 343 U. S. 717; *Chandler v. United States*, 171 F. 2d 921 (C.A. 1), certiorari denied, 336 U. S. 918; *Burgman v. United States*, 188 F. 2d 637 (D.C. Cir.), certiorari denied, 342 U. S. 838. And the power of Congress to enact legislation applicable to Americans abroad "is one of construction, not of legislative power." *Blackmer v. United States*, 284 U. S. 421, 437. The broad generalization from the *Ross* case, 140 U. S. at 464, "The Constitution can have no operation in another country", plainly cannot stand today without qualification.

Certainly it cannot be taken literally. Whenever our troops are stationed abroad, the President does not cease to be their Commander-in-Chief (Art. II, Sec. 2). And to the extent that offending members of our forces are tried by court-martial, Clause 14 of Sec. 8 of Art. I is, plainly, operating in another country. And so, on at least three modern occasions, this Court has been careful to qualify the statement from *In re Ross*, *supra*, so that it reads—with italics added—"Neither the Constitution nor the laws passed in pursuance of it have any force in foreign territory unless in respect of our own citizens." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 318; *United States v. Belmont*, 301 U. S. 324, 332; *United States v. Pink*, 315 U. S. 203, 226.

Why, then, should not the guarantees of Article III, Sec. 2, and of all the Bill of Rights, be available to an

American civilian in time of peace when he is abroad in non-occupied territory, when officers of the United States Government seek to deal with him? In that situation, where the war power cannot be exerted (compare, as to occupied territory, *Madsen v. Kinsella*, 343 U. S. 341, and the discussion above, pp. 73-76), it is difficult to see why certain affirmative constitutional grants of power are deemed available for export, while constitutional protections, including all of the Bill of Rights, must stop at the water's edge.

If Congress were now to provide for consular or other non-jury courts to try American civilians accompanying the armed forces in time of peace in non-occupied territory abroad, then the continued validity of *In re Ross*, 140 U. S. 453, would be squarely in issue, and all would learn whether its mention in *Ex parte Bakelite Corp.*, 279 U. S. 438, 451, is any better guaranty of its continued vitality than was the recital, in the same decision, of the supposed status of the courts of the District of Columbia.⁶¹

But that intriguing question is not presented by the case at bar. The question here is not whether this appellee could claim the protection of the Fifth and Sixth Amendments as against a consular or other non-jury court. Nor is the question whether this appellee, as a civilian, can claim any constitutional rights, whether under the Fifth or Sixth or Eighth or any other Amendment, as against a tribunal having power to try her. The question for decision is not simply a proposal (*Burney Appendix*, p. 57) to "substitute the words 'military courts-martial' for the words 'consular tribunals'." The issue here is whether courts-martial, wherever located, have been given power to try civilians in time of peace at all. Otherwise stated, the question concerns not the protection afforded the accused

⁶¹ It was said in *Bakelite*, at p. 450, that these courts were legislative courts. Only four years later, however, it was squarely ruled that the courts of the District of Columbia were constitutional courts. *O'Donoghue v. United States*, 289 U. S. 516.

by the Bill of Rights, but the power conferred by the Constitution itself upon the tribunal before which she is haled.

This is a problem to which, perhaps understandably, neither appellant nor the *Burney* Appendix ever face up squarely.

It has been shown that, by understanding preceding even the adoption of the Constitution itself, and by unbroken practice for much more than a century thereafter, civilians were never subjected to trial by court-martial in time of peace, but only in time of war when in the field. That may be taken as reflecting a consistent, settled, and hence authoritative construction of the power "To make Rules for the Government and Regulation of the land and naval Forces."

Does that power somehow become broader in its scope once the national boundaries are left behind? Does the phrase "land and naval Forces" have a wider content overseas? The Continental Congress, which sent Arnold and Montgomery to capture Montreal and then on to the gates of Quebec, and which later sent John Paul Jones to harry the enemy's shipping in British waters, assuredly did not conceive of land and naval forces as limited to engagements or contests on home grounds. The notion of American forces overseas, therefore, can hardly have been absent from the Founders' contemplation.

Some military powers, true, are geographically circumscribed; the terms of the Militia Clause prevent the militia, as such, from being sent outside the country. 29 Op. Atty. Gen. 322. Other military powers are enlarged in time of war: the war power, though not unlimited (*United States v. Cohen Grocery Co.*, 255 U. S. 81), is well nigh plenary. See pp. 70-73, *supra*. And the power to govern the armed forces has always extended to civilian camp followers in time of war when they are in the field.

But nothing in the Constitution, and nothing in its history, enlarges the class of persons over whom the court-martial power can be exercised simply because that power is sought to be exerted beyond the three-mile limit.

Consequently, whatever may be the present validity of *In re Ross*, 140 U. S. 453, whatever may be the protections generally available to American citizens against acts of American officers committed abroad, it is plain that the power of a court-martial over civilians in time of peace is neither expanded nor enlarged by the circumstance that it sits outside the United States.

H. Disciplinary Considerations Underlying the Court-Martial Power Do Not Extend to Dependent Wives

In the *Toth* case, the Court said (350 U. S. at 17);

"Unlike courts, it is the primary business of armies and navies to fight or be ready to fight wars should the occasion arise. But trial of soldiers to maintain discipline is merely incidental to an army's primary fighting function. To the extent that those responsible for performance of this primary function are diverted from it by the necessity of trying cases, the basic fighting purpose of armies is not served."

Counsel cannot forbear to remark that the basic fighting purpose of the United States Air Force would be better served by more attention to the matter of our air supremacy and somewhat less to that of trying civilian women by court-martial.

And, further from the *Toth* opinion (350 U. S. at 22).

"It is impossible to think that the discipline of the Army is going to be disrupted, its morale impaired, or its orderly processes disturbed, by giving ex-service-men the benefit of a civilian court trial when they are actually civilians."

That being true of ex-servicemen, it applies with greater force in the case of a woman who was never in the service at any time.

"Free countries of the world have tried to restrict military tribunals to the narrowest jurisdiction deemed absolutely essential to maintaining discipline among troops in active service" (350 U. S. at 22).

As has been seen (*supra*, pp. 61-64), for 175 years the United States Army never deemed it necessary to court-martial wives in order to maintain discipline among its members.

"Court-martial jurisdiction spring from the belief that within the military ranks there is need for a prompt, ready-at-hand means of compelling obedience and order. But Army discipline will not be improved by court-martialing rather than trying by jury some civilian ex-soldier who has been wholly separated from the service for months, years or perhaps decades. Consequently considerations of discipline provide no excuse for new expansion of court-martial jurisdiction at the expense of the normal and constitutionally preferable system of trial by jury" (350 U. S. at 22-23).

"We hold that Congress cannot subject civilians like Toth to trial by court-martial. They, like other civilians, are entitled to have the benefit of safeguards afforded those tried in the regular courts authorized by Article III of the Constitution" (350 U. S. at 23).

Consequently this appellee, held in the District of Columbia jail (R. 1, 2, 5) for trial in the District of Columbia (R. 2, 8) is entitled to the protections accorded any other civilian so held for trial.

But, appellant urges (U. S. Br. 31-32).

"In the eyes of this country, and of the foreign nations in which our armed forces are stationed, the civilians described in Article 2(11) are part of the American military contingent abroad. Their actions directly affect the reputation, the status, and the discipline of

our armed forces overseas, as well as their continued acceptability to the host governments. It is, therefore, fitting that civilians who accompany the armed forces to foreign duty stations be subject to discipline under American military law."

Apart from the circumstance that the foregoing is again largely inflated with rhetoric, it contains as well demonstrable fallacies.

To begin with, the United States has large numbers of other civilian employees and dependents stationed abroad, whose actions similarly affect American standing in foreign eyes. Next, if the conduct of dependent wives presents grist for the disciplinary mills of the services, the misconduct of dependent adolescent children does likewise—and yet the Uniform Code of Military Justice is plainly unsuited to dealing with offenses committed by civilian juveniles. And, finally, once the actual figures are looked to, the problem of civilians overseas, which is blown up to such fantastic proportions in appellant's brief, is shown to be a very small matter that is easily manageable through normal and constitutional means.

First. Appellant states (U. S. Br. 29) that there are now 20,000 civilians employed and serving with the United States armed forces overseas, as well as approximately 250,000 civilian dependents; and that (U. S. Br. 30) "Misconduct by such civilians abroad, not less than misconduct by those in service, could cause international friction in areas where harmony and cooperation are of the highest importance."

But the United States has other civilian employees abroad as well. During January 1956, it had a total of over 204,000 such employees, other than foreign nationals, employed outside the continental limits, and of that number over 62,000 were employed by agencies other than the Department of Defense, of which more than 21,500 were employees of the Department of State. 102 Cong. Rec. 3494-3495

(daily ed., March 6, 1956). Included in the 62,000 non-Defense employees were some 15,000 persons employed by the Panama Canal, presumably in the Canal Zone, and doubtless others in the total (though probably not many of the State Department personnel) are also employed on American soil though outside the continental limits of the United States.

If, as appellant urges, the actions of the 20,000 Defense Department employees abroad affect discipline and reputation, why is that not equally true of the actions of other Government employees serving in foreign countries? No doubt many of the non-Defense employees are accompanied by their dependent wives and other relatives. If, then, it is important to insure a standard of conduct on the part of American civilians abroad under the auspices of the armed forces which will be conducive to (U. S. Br. 32) "their continued acceptability to the host governments," why is it not equally important to insure a similar standard of conduct by other American civilians who are abroad under auspices of other executive departments? If the reputation of the Air Force, and thus of the United States, can be affected by the conduct of a sergeant's wife, is there not equal danger to American reputation when the deviation from the desirable norm is committed by the wife of a Point Four administrator, or, for that matter, by the accompanying mother-in-law of a United States Information Agency executive? And could not the misconduct of American tourists equally (U. S. Br. 30) "cause international friction in areas where harmony and co-operation are of the highest importance"?

The fact is that all these groups stand on the same footing, without the slightest effect on the discipline of the armed forces, at which alone the Clause 14 power is directed.

Second. Dependent children of service personnel abroad, whether minors or otherwise, fall literally within the terms

of Article 2(11). They, like their respective mothers, are accompanying the armed forces of the United States overseas, and fall within appellant's contention (U. S. Br. 47) that "In today's circumstances, civilians accompanying the armed forces overseas, including dependents, are an intimate part of the American military contingent abroad." Assuming for the moment that this is so, what then shall be the test of criminal amenability for any such children who seriously misbehave?

The common law test, which held that a child under seven was conclusively presumed incapable of crime, while between seven and fourteen the presumption was rebuttable? See *Allen v. United States*, 150 U. S. 551, 558. Or the modern juvenile court rule, with its varying limitations? See D. C. Code (1951 ed.) §§ 11-906, 11-907, 11-914 (16, 18, and 21 years, as the case may be); and compare the federal provisions for the correction of youthful offenders, 18 U. S. C. §§ 5001, 5006(e) (21 and 22 years). The Uniform Code of Military Justice is silent on the point—for obvious reasons—nor does it contain the familiar juvenile court provision that conviction in such a tribunal does not affix a criminal record to the offending minor. D. C. Code (1951 ed.) § 11-915; 18 U. S. C. § 5021. Yet under appellant's arguments there is just as much reason to subject to trial by court-martial the misbehaving teen-age son of a serviceman abroad as there is to assert military jurisdiction over that serviceman's dependent wife.

Third. The problem of controlling civilian dependents, which is so inflated by appellant's verbalisms (U. S. Br. 31-32, 37-39, 42-43, 47-48) and, preeminently, by the impassioned prose of the *Burney* Appendix, pp. 75-78, needs only the sharp needle of fact to reduce it to its true proportions.

A. Of the 8300 cases docketed by the United States Court of Military Appeals through the end of March, 1956, only 37, or about four tenths of one per cent, involved accom-

panying civilians.⁶² And some of those, exact number unknown, involved trials by courts-martial in occupied territory where such courts were exercising military government powers. See notes 48 and 56 and, generally, pp. 73-76, *supra*.

B. Even those 37 cases apparently involved many offenses of only minor concern, because only 6 civilians convicted by court-martial have, up to now, been turned over to the Attorney General for confinement in federal penal institutions, and the cases of two of those individuals are presently before this Court.⁶³ Again, it is not known whether the three persons not accounted for in note 63 were tried by courts-martial sitting in occupied territory.

The problem, therefore, is essentially a minor one. There is no compelling or practical reason whatever why accompanying civilians cannot be dealt with in recognized and constitutional ways. The proper alternatives that are available are briefly explored below, at pp. 102-107.

In any event, it is not necessary to prolong the discussion under Point III. The short of the matter is that, howsoever the problem is approached, the power to make rules for the government and regulation of the land and naval forces is not a power to govern or regulate the wives of members of those forces.

⁶² Figures supplied by the Clerk of that Court. 36 cases involved petitions for grant of review under Art. 67(b)(3), UCMJ, the other a certificate under Art. 67(b)(2).

⁶³ Figures supplied by the Bureau of Prisons, April 6, 1956. Of the 6 cases involving civilian prisoners serving sentences imposed by courts-martial, three were males and three were women: This appellee; Mrs. Smith (of No. 713), and the British subject, Mrs. Brillhart, whose case is discussed *infra*, at p. 96.

The Bureau of Prisons further advises that only 5 such prisoners are now being held; the difference reflects appellee's transfer from Alderson to appellant's custody last July (R. 2, 8, 123).

IV. THE TREATY POWER IS COMPLETELY IRRELEVANT IN THE PRESENT CASE

Obviously unsure and uncertain of his contentions under the law military, appellant argues at length (U. S. Br. 48-61) that the Air Force's right to try appellee by court-martial within the District of Columbia can be supported as an exercise of the power to treat with foreign countries. Analysis of the pleadings, of the legislative history of Art. 2(11), and of the practice thereunder, shows that resort to the treaty power is an afterthought. Further, nothing in the exercise of treaty power relied on by appellant shows the slightest intention on the part of either of the contracting powers to enlarge in any way the jurisdiction of American courts-martial. And, finally, the treaty power must be exercised, so far as American citizens are concerned, within the limits of the Constitution, so that no treaty could authorize the trial of a civilian in the District of Columbia otherwise than by a jury.

These propositions will be expanded below.

A. The Invocation of the Treaty Power is an Afterthought, Supported Neither by the Pleadings in This Case, Nor by the Legislative History of Art. 2(11), Nor by the Practice Thereunder

It is well to recognize at the outset the scope claimed by appellant for the treaty power, viz., that if he fails to establish a sufficient basis for appellee's trial by court-martial as an exercise of the power "To make Rules for the Government and Regulation of the land and naval Forces", he can somehow supply that deficiency by supporting such trial (U. S. Br. 48) "as an appropriate exercise by Congress of its power to enact legislation necessary and proper for carrying into execution those international agreements and treaties negotiated by the President whereby components of the United States armed forces stationed in friendly foreign nations are secured the right

to try all persons serving with, employed by, or accompanying those forces for offenses committed by them in such foreign lands for which they would otherwise be subject to trial in the courts of the country where they are stationed."

That this is a somewhat belated effort to shore up a faltering case can readily be demonstrated.

First. The Pleadings. True, par. XVIII of appellant's return and answer (R. 10-11) does mention the circumstance that the British authorities relinquished jurisdiction over appellee. That paragraph avers that the Act of the British Parliament known as the United States of America (Visiting Forces) Act, 1942, St. 5 & 6 Geo. VI, c. 31, was based on the "assumption" that the United States military authorities would be able to try persons in appellee's situation. But after making every intendment in favor of appellant's return, as well as all allowances for the looseness of mid-20th Century pleading, it is impossible to draw from the paragraph in question even the outline of the argument now advanced, viz., that if the court-martial power is inadequate, the treaty power will somehow supply the necessary.

Second. The Legislative History. Far from reflecting any intention to base the jurisdiction asserted by Art. 2(11), UCMJ, upon the treaty power, the legislative history of that provision shows that that extraterritorial jurisdiction which, however mistakenly, was assumed to rest on the power to regulate and govern the armed forces, was limited so that it would not conflict with the assertion, by other countries where our forces might be stationed, of their own territorial jurisdiction.

That was the only purpose of adding to both Arts. 2(11) and Art. 2(12) their present opening clauses, viz., "Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted

rule of international law." (See *supra*, pp. 57-58, and U. S. Br. 57-60.

That is likewise the only possible meaning of the sentence in the House Report quoted in italics at U. S. Br. 59, "we fully recognize the fact that certain limitations have been placed upon the jurisdiction of the United States by virtue of certain treaties and agreements and that this jurisdiction may be further curtailed by future agreements."

Consequently the introductory clause of Art. 2(11) is one of limitation, limiting conformably to treaty and in consonance with the claims of foreign countries a wider American jurisdiction that was based on the court-martial power. To that extent there was (U. S. Br. 57) a "recognition of the impact of proposed Article 2(11) on foreign affairs." But the legislative history of Art. 2(11) assuredly lends no support to views now formulated, to the effect that Congress in that provision was asserting a power that it considered to be based on treaty.⁶⁴ It is simply impossible to draw from the discussions concerning Art. 2(11), either at the hearings, in the Committee Reports, or on the floor of both houses (references *supra*, pp. 57-58) the treaty power argument that appellant now constructs, long after the event.⁶⁵ The legislative materials prove that Congress simply assumed that, in enacting Art. 2(11), it was

⁶⁴ The next sentence quoted from the House Report (U. S. Br. 59) is, "Certainly, we do not desire to arouse the suspicion of any foreign governments by the use of any language in this code which would appear to give the armed forces jurisdiction in excess of obligations which we have already or may in the future assume by treaty or agreement." This is ambiguous; does the jurisdiction rest on obligations, or are the forces there pursuant to obligations? In any event, clause by clause analysis of Article 2 in the body of both Committee Reports discloses no reliance whatever on the treaty power.

⁶⁵ Appellant's failure to refer to such legislative history as seems to be in his favor (see note 50, *supra*) strongly cautions against accepting his reading of that history at face value.

combining and revising two existing statutes, AW 2(d) and 34 U. S. C. § 1201, and that it was enacting a Uniform Code of Military Justice in pursuance of its Clause 14 power to govern and regulate the armed forces.

Third. The Practice. The jurisdiction purportedly conferred by Art. 2(11), UCMJ, has in fact been exercised without reference to the terms of agreements with foreign countries, as the following examples show.

(i) In *United States v. Robertson*, 5 USCMA 806, 19 CMR 102, the accused, a merchant seaman, was a member of the crew of a Department of Commerce vessel allocated to the Military Sea Transportation Service. Accused's offense took place during the course of the Korean hostilities, but the vessel was not shown to have carried military personnel, it did not sail in convoy, and the cargo, while consigned to the U. S. Army in Japan, was not designed for immediate combat operations. Trial by court-martial followed the effective date of the Peace Treaty with Japan.

The Court of Military Appeals specifically held that the accused was not a member of the "civilian component" within the meaning of the Administrative Agreement with Japan (Pet. Br. 16-25, No. 713), but upheld court-martial jurisdiction under Art. 2(11) none the less. If, as appellant here now urges, power to try civilians rests on the treaty power, the *Robertson* case necessarily must have been decided the other way.

(ii) In *United States v. Weiman*, 3 USCMA 216, 11 CMR 216, the two accused were Polish nationals, employed by the United States Army in Germany, and brought to France as members of a Labor Service Company. They were not enlisted men and consequently their status was that of "retainers to the camp" within Art. 2(11), UCMJ, not that of soldiers.

Court-martial jurisdiction was sustained. A secret security agreement with France, referred to in the court's opinion (pp. 219-220), is said to have "contemplated" the exercise of military jurisdiction over persons in the category of the accused. It is, of course, impossible to argue with an unseen document, but, even so, just how the treaty power authorizes trial by American court-martial of Polish nationals in France, on the assumption that such authority cannot be found in Clause 14 of Article I, Section 8, requires more explanation than is found in appellant's brief.

(iii) In *United States v. Eunice M. Brillhart*, CM 376967, no opinion, petition for grant of review denied June 13, 1955 (USCMA No. 6774), the accused, the wife of an American sergeant, was a British subject. She was tried by an Army court-martial in Eritrea for offenses committed in Eritrea, viz., the premeditated murder of three infant children. As a British subject, she could have been tried by a British court, in view of Sec. 9 of the Offences against the Person Act, 1861 (St. 24 & 25 Vict., c. 100), and before that tribunal, by reason of the provisions of the Infanticide Act, 1938 (St. 1 & 2 Geo. VI, c. 36), she would have been subject to far less severe penalties than the life sentence adjudged by the U. S. Army court-martial and later affirmed without modification.

Under the provisions of 8 U. S. C. § 1182(a)(9), Mrs. Brillhart, who, plainly, had been convicted of a crime involving moral turpitude, was an alien whom Congress had by law excluded from admission into the United States. She was in fact brought into this country pursuant to 8 U. S. C. § 1182(d)(5), which provides that "The Attorney General may in his discretion parole into the United States temporarily under such conditions as he may prescribe for emergent reasons or for reasons deemed strictly in the public interest. * * *." At present, therefore, Mrs. Brillhart is confined in the Federal Reformatory for Women at Alderson for the term of her natural life.

It would be interesting to learn just what aspect of the treaty power was exerted to put her there.

The short of the matter is that, in fact, the armed forces have relied, for their subjection of civilians overseas to military jurisdiction, on the terms of AW 2(d) and Art. 2(11), UCMJ; that they assumed, however mistakenly, that the only test was whether the particular case was one "arising in the land or naval forces" within the Fifth Amendment, which they regarded as a grant of power; and that military trials of civilians overseas were never sought to be supported as an exercise of the treaty power before appellant filed his Statement as to Jurisdiction in this case in February of the present year.

Omission of any reference to the treaty power in the pleadings here and in the *Krueger* case (R. 6-8, No. 713) was accordingly neither accidental nor inadvertent.

B. The British Statute Known as the United States of America (Visiting Forces) Act, 1942, Did Not Purport to Enlarge the Jurisdiction of American Courts-Martial

But the argument based on the treaty power is not only an afterthought, it is a very poor afterthought. Examination of the international agreement relied upon affords no assistance to appellant in his quest for court-martial jurisdiction.

1. The mountain of the treaty power to which appellant points yields forth simply the mouse of an exchange of notes, both dated July 27, 1942, between the British Foreign Secretary and the American Ambassador to Britain (U. S. Br. 74-78). That exchange, succinctly stated, is to the effect that, during World War II, American servicemen in Britain shall be tried by American courts-martial.⁶⁶

⁶⁶ Reciprocal arrangements for the trial of British servicemen in the United States by British courts-martial were made by the Act of June 30, 1944, c. 326, 58 Stat. 643 (22 U. S. C. §§ 701-706), and Proclamation No. 2626, Oct. 12, 1944, 9 Fed. Reg. 12403.

Nothing whatever in either note deals with civilian dependents of American servicemen—a not unreasonable omission, as dependents did not in July 1942 or for some years thereafter accompany the American forces in or to England. Yet, if appellee's trial by court-martial is to be supported by the treaty power, the agreement effected by the exchange of notes is the rock on which appellant must build his case.

2. The United States of America (Visiting Forces) Act, 1942, was the Act of the British Parliament which gave effect to the foregoing agreement. To the extent that it varied the terms of the agreement, it may well be deemed invalid so far as the United States is concerned, being unilateral. But it is not necessary to pursue that inquiry, for the reason that nothing in the statute purports in any way to enlarge the jurisdiction of American courts-martial.

Section 2(1) of the Act (U. S. Br. 76) provides:

“For the purposes of this Act and of the Allied Forces Act, 1940, in its application to the military and naval forces of the United States of America, all persons who are by the law of the United States of America for the time being subject to the military or naval law of that country shall be deemed to be members of the said forces:

“Provided that no person employed in connection with the said forces, not being a citizen or national of the United States of America, shall be deemed to be a member of those forces unless he entered into that employment outside the United Kingdom.”

That is to say, the basic British law was⁶⁷ that anyone

⁶⁷ Following the ratification of the NATO Status of Forces Treaty, TIAS 2846, 4 U. S. Treaties 1792, the British Parliament enacted the Visiting Forces Act, 1952, St. 15 & 16 Geo. VI & 1 Eliz. II, c. 67, Section 18 of which repealed the United States of America (Visiting Forces) Act, 1942. The Visiting Forces Act, 1952, went into effect on June 12, 1954, and became effective as to the United States on the same day. See Visiting Forces Act,

who as a matter of American law is subject to American military jurisdiction is as a matter of British law likewise subject to American military jurisdiction. The definition in the British Act, therefore, leaves entirely open the issue here, which is whether appellee, as a matter of American law—including, obviously, American constitutional law—is subject to military jurisdiction. Consequently, for appellant to argue that the grant of court-martial jurisdiction is broadened by the Visiting Forces Act of 1942 is to argue in a particularly unprofitable circle.⁹⁸ But, in fact, appellant's arguments based on the British Act of 1942 (U. S. Br. 53-57) never face up to the actual provisions of that statute, and never even seek to explain just how the agreement underlying the British enactment enlarges the classes of Americans who, but for such agreement, would not be triable by court-martial.

Indeed, far from enlarging the categories of persons who could be tried by American courts-martial, the effect of the quoted proviso to Sec. 2(1), *supra*, p. 98, was to exclude from American military jurisdiction any British subjects employed in the United Kingdom to work for the United States forces there, and to preclude the application to them of the terms of AW 2(d) of 1920 within which they were literally embraced.

It was this limitation,—among others—that was, as has been noted above, pp. 57-58, 93-94, responsible for the addition to Art. 2(11), UCMJ, of its present opening clause, viz., "Subject to the provisions of any treaty or agreement to

1952 (Commencement) Order, 1954; Visiting Forces (Designation) Order, 1954.

Under the later legislation, which conforms to the NATO Status of Forces Treaty, American servicemen of course no longer enjoy complete extraterritoriality.

⁹⁸ Apparently appellant does not contend that the certificate of Colonel Gillem, USAF (R. 130), to the effect that appellee was subject to American military law, is to be regarded as conclusively establishing such subjection.

which the United States is or may be a party or to any accepted rule of international law."

3. The result is that appellant, notwithstanding his invocation of the treaty power, has failed to point to any treaty or executive agreement which in this case purported to enlarge the grant of court-martial jurisdiction that is now narrowly circumscribed by Clause 14, Section 8, Article I, of the Constitution.

C. No Exercise of the Treaty Power Could Authorize the Trial of a Civilian by Court-Martial in the District of Columbia

But for the circumstance that the argument is actually made by appellant, one could not have supposed it would ever be contended that, by virtue of the treaty power, a civilian could be tried by court-martial within the District of Columbia.⁶⁹

But since the argument is made, it will be answered.

1. Assuming *arguendo* that appellant has been able to point to a treaty or agreement which purports to enlarge the power to try civilians by court-martial, the short answer is that an such exertion of the treaty power would be invalid as applied to this appellee at this time.

Not only the Sixth Amendment, but also Section 2 of Article III guarantee the right of trial by jury. Those provisions are fully applicable to civilians in the District of Columbia. Therefore any treaty that attempted to abridge that right could not be given effect, since even the treaty power, "like every other government power, must be exercised in subordination to the applicable provisions of the Constitution." *United States v. Curtiss-Wright Corp.*, 299 U. S. 304, 320.

⁶⁹ Since all the events now under consideration occurred in time of peace, and since appellee was not charged with any violation of the law of war, *Ex parte Quirin*, 317 U. S. 1, is obviously irrelevant.

Indeed, only at the last Term, the present Solicitor General urged on this Court the existence of those very limitations on the treaty power. He said in *United States v. Capps*, 348 U. S. 296 (U. S. Br., No. 14, Oct. T. 1954, p. 32):

"The basic axiom is that, as a sovereign state, the United States possesses, in its dealing with other states, all of the normal powers of a fully independent nation, subject to constitutional limitations like the Bill of Rights which govern all exercise of governmental authority in this country."

And again (*id.*, p. 49):

"Together with statutes and treaties, executive agreements are subject to the Bill of Rights and the other clauses of the Constitution which protect all Americans from the excesses of official authority."

Appellee heartily agrees with the quoted propositions—which, plainly, control the present case, and which completely demolish the contentions now advanced as to why, because of the treaty power, she may be tried by court-martial in the District of Columbia.

2. Reliance is placed on *Neely v. Henkel*, 180 U. S. 109. But, as explained above, pp. 72-73, that case simply upheld *Neely's* extradition to Cuba, then under American military occupation following the Spanish War, to be tried there, by an American military commission, for an offense committed there. In that case, the military commission was an American military government tribunal, functioning as an instrumentality of the American military government of Cuba.

Neely v. Henkel most certainly did not hold that *Neely* could have been tried by an American military commission in the Southern District of New York, from whence he was extradited. Yet the case must go to those lengths if it is to help appellant here.

The net of the foregoing is that appellant's trial counsel were well advised not to invoke the treaty power below.

V. TO THE EXTENT THAT APPELLANT'S INVOCATION OF THE NECESSARY AND PROPER CLAUSE BRINGS THE MATTER INTO THE REALM OF JUDGMENT, EXAMINATION OF THE REALITIES OF TRIAL BY COURT-MARTIAL DEMONSTRATES THAT THE PRINCIPLE OF "THE LEAST POSSIBLE POWER ADEQUATE TO THE END PROPOSED" IS ONE PREEMINENTLY APPLICABLE TO THE SCOPE OF MILITARY JURISDICTION

As has been noted above, page 39, *Toth v. Quarles*, 350 U. S. 11, held that the grant of court-martial power is not to be broadly construed by reason of anything in the Necessary and Proper Clause of the Constitution. Nothing daunted, appellant now invokes that clause in an attempt to establish that it is necessary to try civilians overseas by court-martial in time of peace (U. S. Br. 30. 48). But inquiry into the realities of military jurisdiction show that, in fact, such trials are neither necessary nor proper.

A. Appellant Fails to Make Out a Case of Factual Necessity Requiring Military Trials of Civilians in Time of Peace

Appellant's case for the supposed necessity of trying accompanying civilians in time of peace is just another instance of a theory wrecked by the stubbornness of facts.

To begin with, as has been demonstrated at length, pp. 61-64, *supra*, no dependent wife was ever tried by an Army court-martial from 1775 to 1950, and no civilians, other than in time of war and in the field, were ever tried by court-martial with the approval of higher authority prior to 1941.⁷⁹ If experience has been the life of the law, then, pretty plainly, a power dormant and never ex-

⁷⁹ The purported courts-martial of Soldiers' Home inmates, noted by Winthrop at *143 (reprint, p. 105), can hardly qualify as exceptions. And see Dig. Op. JAG, 1912, p. 1010, ¶ I; *id.*, p. 1012, ¶ II, holding unconstitutional and a dead letter statutes purporting to subject such inmates to the Articles of War.

exercised during the better part of two centuries hardly spells out any very pressing necessity.

Next, as has also been shown, pp. 88-89 *supra*, the United States has many other civilian employees presently employed in foreign countries who are not subject to the Uniform Code, employees apparently as numerous as those paid out of Department of Defense appropriations. Presumably those other civilians are accompanied by their dependents. And yet the inability to try that large non-military group of Americans by court-martial has not evoked the contention (U. S. Br. 29-31, 37-39, 47-48, 50-51, 64-65; *Burney* Appendix, pp. 75-78) that necessity requires confirmation of the power now asserted.

Finally—although it is really not up to appellee to propose a solution—ample, constitutional, and entirely practicable means are at hand to try persons in appellee's position.

First. As has been shown by reference to the actual figures, *supra*, pp. 90-91, serious offenses by accompanying civilians arise very infrequently.

Insofar as such offenses are committed against foreign nationals, such American civilians—like American servicemen similarly situated—are now subject to trial in foreign courts. Article VII 3(b) of the NATO Status of Forces Treaty, TIAS 2846, 4 U. S. Treaties 1792, 1800; Paragraph 3(b), Amendment of Article XVII of The Administrative Agreement with Japan, TIAS 2648, 4 U. S. Treaties 1846, 1848.⁷¹

Insofar as such offenses are committed against American civilians, as here and in No. 713, then Congress can provide for the trial of such offenders in the first American judicial district to which they are brought, 18 U. S. C. § 3238. This is the traditional forum for offenses com-

⁷¹ Old Article XVII (Pet. Br. 20-24, No. 713; *Burney* Appendix, pp. 81-82) is no longer in force—a matter overlooked by *Burney*.

mitted by Americans on the high seas or within the admiralty jurisdiction (*United States v. Flores*, 289 U. S. 137) or in uninhabited territory (*Jones v. United States*, 137 U. S. 202) or for offenses that can be committed anywhere (*United States v. Bowman*, 260 U. S. 94; *Blackmer v. United States*, 284 U. S. 421).

It is argued that such trials are wholly impracticable because of the difficulties of transporting witnesses to the appropriate American forum (U. S. Br. 51; *Burney* Appendix, pp. 54, 84-86). But such a defeatist attitude underestimates the resourcefulness of those who prosecute in the name of the United States. Dröves, if not indeed clouds, of witnesses were successfully transported to the United States from Europe and from Asia to testify at the post-war treason trials of many American citizens. *Chandler v. United States*, 171 F. 2d 921 (C.A. 1), certiorari denied, 336 U. S. 918; *Best v. United States*, 184 F. 2d 131, (C.A. 1), certiorari denied, 340 U. S. 939; *Gillars v. United States*, 182 F. 2d 962 (D.C. Cir.); *Burgman v. United States*, 188 F. 2d 637 (D.C. Cir.), certiorari denied, 342 U. S. 838; *D'Aquino v. United States*, 192 F. 2d 338 (C.A. 9), rehearing denied, 203 F. 2d 390, certiorari denied, 343 U. S. 935. And, just the other day, the Department of Justice announced the arrival in Washington of 18 witnesses flown from Italy to testify in a perjury trial growing out of the Holohan murder case.⁷²

But, it is said, foreign nations will be reluctant to release American civilian offenders to be tried in American civilian courts (U. S. Br. 46, 49, 50-51, 64-65; *Burney* Appendix, pp. 58, 80).

The fear expressed is largely imaginary, for several reasons.

⁷² "18 Italians To Testify at Icardi Trial", *Washington Post*, April 9, 1956, p. 3; "18 Arrive Here for Icardi Trial", *The Evening Star*, April 9, 1956, p. A-14. See *In re Lo Dolce*, 196 F. Supp. 455 (W. D. N. Y.).

(i) Once the foreign nation relinquishes jurisdiction, it will be a matter of indifference to it whether the accused is tried by a military or a civil tribunal of the United States. And surely the good faith of the United States affords ample assurance that such an accused will not simply be turned loose once he—or she—is returned to American soil.

(ii) The civil jurisdiction discussed under the present heading is one which, as this Court has said (*American Banana Co. v. United Fruit Co.*, 213 U. S. 347, 356), is based on "the old notion of personal sovereignty." See also *Skiriotes v. Florida*, 313 U. S. 69, 73-74. Such a jurisdiction is presently provided for in England by the *Offences against the Person Act, 1861*, *supra*, p. 96, which makes homicide committed by a British subject anywhere in the world triable in a British court, and has in fact long been exercised there under predecessor statutes. E. g., *Regina v. Azzopardi*, 1 Car. & K. 203 (1843).

When and if Congress enacts a similar statute, such an extension of jurisdiction will hardly be deemed to have an irrational basis, and requests for delivery thereunder of offenders not subject to the primary jurisdiction of the host state will no doubt be sympathetically received. Indeed, it may be ventured that few foreign nations friendly enough to permit us to station our troops on their soil in time of peace will insist on their theoretical right to try an American woman for an offense committed by her against another American.

What the Court said in *Toth v. Quarles*, 350 U. S. at 21, of trials of civilian ex-servicemen is fully applicable to the trial of civilian dependents of servicemen: "There can be no valid argument, therefore, that civilian ex-servicemen

Second. It is insisted (*Burney* Appendix, pp. 79, 82) that the only alternative to the trial of accompanying civilians by court-martial is to force them into foreign courts. Apart from the circumstances that, as has been shown, there are other alternatives, and that, as has also been shown, such civilians are now in fact subject to trial by foreign courts for many of their misdeeds, the implication of the argument, that trial in foreign courts is somehow the ultimate horrible, that it is actually (*Burney* Appendix, p. 79) "unpalatable", will not survive analysis.

It is only necessary, under this heading, to refer to the extensive testimony of representatives of the Departments of State, Defense, and Justice, given only last summer, all of it to the effect that the relinquishment of jurisdiction over Americans to the courts of the NATO countries is working satisfactorily. See *Status of Forces Agreements*. Hearings before the House Committee on Foreign Affairs, 84th Cong., 1st sess., on H. J. Res. 309 and similar measures, at pp. 160-374.

Third. So far as American civilian employees of the armed forces are concerned, they must either be made triable in federal district courts as above suggested, or else the Department of Defense and the Congress must make a choice between leaving them triable by foreign courts in a civilian status, or else militarizing them in order to render them amenable to trial by court-martial. After all, there is no military reason that requires stenographers, clerks, or post-exchange employees to be civilians; and the Navy's Construction Battalions—the Sea Bees—were organized in response to the view that construction personnel in combat or near-combat zones are more easily and appropriately controlled if they have full military status. If it is true that accompanying civilians must imperatively be subjected to military discipline (U. S. Br. 38-39; *Burney* Appendix, pp. 75-79), then, plainly, they should be sent overseas only in a frankly military status, as members of the forces.

But, it is said (U. S. Br. 29) that considerations of economy require the armed forces to rely upon civilian employees rather than soldiers, and that (*Burney* Appendix, p. 85) similar considerations of economy preclude trial of such civilians in constitutional courts.

It seems sufficient to reply to such arguments that budgetary considerations have never, certainly not until now, been recognized as valid reasons for denying constitutional rights.

At any rate, the question of how to deal with the disciplinary problems posed by the present case is for the Congress. Ample means are at hand; the considerations involved are legislative in character. All that need now be said is that, under any solution which is ultimately adopted, adherence to constitutional limitations is highly unlikely to result in the "tremendous expense, fantastic waste, cumbersome procedures and interminable delay" now so graphically if unprophetically asserted at p. 86 of the *Burney* Appendix.

B. Subjecting Civilians to Military Jurisdiction in Time of Peace Not Only Deprives Them of Their Right to Trial by Jury, But Necessarily Cuts Off Other Constitutional Protections

In *Board of Education v. Barnette*, 319 U. S. 624, 642, n. 19, the Court said, "The Nation may raise armies and compel citizens to give military service. *Selective Draft Law Cases*, 245 U. S. 336. It follows, of course, that those subject to military discipline are under many duties and may not claim many freedoms that we hold inviolable as to those in civilian life."

At this juncture it would be well to list the "many freedoms" that are unavailable to persons subject to the Uniform Code of Military Justice.

1. To begin with, the U. S. Court of Military Appeals has held that the rights of servicemen are statutory rather

than constitutional. *United States v. Clay*, 1 USCMA 74, 1 CMR 74. In that case the court said (p. 77):

"Generally speaking, due process means a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the enforcement and protection of private rights. For our purposes, and in keeping with the principles of military justice developed over the years, we do not bottom those rights and privileges on the Constitution. We base them on the laws as enacted by Congress. But, this does not mean that we can not give the same legal effect to the rights granted by Congress to military personnel as do civilian courts to those granted to civilians by the Constitution or other federal statutes."

Notwithstanding the last sentence of the quotation, examination of the decisions of the Court of Military Appeals discloses significant variations from constitutional norms applicable in cases arising in United States courts established under Article III.

2. Thus, despite the Eighth Amendment, bail is non-existent in military jurisprudence. See Dig. Op. JAG, 1912, p. 481, ¶ I C: "Bail is wholly unknown to the military law and practice; nor can a court of the United States grant bail in a military case." And "bail" is not even an indexed topic in Winthrop. For the constitutional standard, see e.g., *Stack v. Boyle*, 342 U.S. 1.

3. The protection against unreasonable searches and seizures available to personnel subject to the Uniform Code is markedly narrower than in the civil courts. *United States v. De Leo*, 5 USCMA 148, 17 CMR 148 (search under French law; strong dissent by Latimer, J.); *United States v. Nove*, 5 USCMA 715, 19 CMR 11 (Sec. 605 of Communications Act (47 U. S. C. § 605) held inapplicable to military telephone systems; Latimer, J., dissenting); *United States v. De Leon*, 5 USCMA 747, 19 CMR 43 (same; Latimer, J., dissenting); *United States v. Ellwein*,

6 USCMA 25, 19 CMR 151 (confession obtained through wire-tap but conviction sustained; Latimer, J., dissenting).

4. A fairly recent military decision involving invasion of the person appears to be at sharp variance with the rule of *Rochin v. California*, 342 U. S. 165. See *United States v. Williamson*, 4 USCMA 320, 15 CMR 320 (catheterization of unconscious soldier sustained; vigorous dissent, on constitutional grounds, by Quinn, C. J.); cf. *United States v. Barnaby*, 5 USCMA 63, 17 CMR 63 (urine sample ordered by superior held admissible in evidence; Quinn, C. J., dissenting).

5. The Court of Military Appeals has held that the use of depositions in court-martial cases does not violate the Sixth Amendment's guarantee of the right to confront witnesses. *United States v. Sutton*, 3 USCMA 220, 11 CMR 220 (Quinn, C. J., dissenting on constitutional grounds).

The foregoing decisions must be read in the light of the circumstance that they are, all of them applicable to civilians tried by court-martial, regardless of occupation—and regardless of sex. Thus, in considering the consequences of subjecting civilians to military jurisdiction in time of peace, it must be borne in mind that such civilians lose more than the right of indictment by grand jury, and more than the right of trial by petty jury; they lose a host of other constitutional rights as well.

True, in the *Burney* case, Judge Latimer said (*Burney* Appendix, p. 68), "Once a person is held to be subject to military law, and he is tried by a court-martial, every right and privilege guaranteed to any citizen by the Constitution is granted him by the Uniform Code of Military Justice, with the exception of a trial by jury and a presentment of a grand jury."

And Chief Judge Quinn said (*Burney* Appendix, p. 87), "Our armed forces are now stationed in 63 foreign countries, as part of our program of national defense and our

effort to preserve the peace of the world. They are not thereby deprived of their Constitutional rights and privileges. On the contrary, those Constitutional rights and privileges are a fundamental part of the military law."

But the foregoing generalizations both overlook the fact that a person subject to the Uniform Code has no right to the bail guaranteed by the Eighth Amendment, nor to the confrontation guaranteed by the Sixth. And the dissents of both judges (pp. 108-109, *supra*) bear eloquent witness to the proposition that, in many significant fields, the person before a court-martial loses many rights available to one tried in a United States District Court without a jury.

Moreover—and this is most disturbing—both judges shrug off, as somehow not really deserving of discussion, the right to a jury trial. It is submitted that this precious heritage, the only individual guarantee that receives double mention in the Constitution, cannot be so lightly brushed aside. There is no need to consider the matter at length at the present juncture. But the attitude reflected seems significant.

C. The Reasons That Justify Curtailment of Individual Rights of Servicemen on the Basis of Fundamental Distinctions Between a Military and a Civilian Society Are Wholly Inapplicable to Civilians Who Accompany the Armed Forces Overseas in Time of Peace

Writing in 1879, General W. T. Sherman said (*Military Law*, 1 J. Mil. Serv. Institution of the U. S. 129, 130):

"The object of the civil law is to secure to every human being in a community all the liberty, security and happiness possible, consistent with the safety of all. The object of military law is to govern armies composed of strong men, so as to be capable of exercising the largest measure of force at the will of the nation."

Or, as Maitland put it (*Constitutional History of England*, p. 279), "This, I think, has been the verdict of long

experience, that an army cannot be kept together if its discipline is left to the ordinary common law."

And so, in many situations, the necessities of discipline and the manifold differences between a civilian and a military society, particularly when the latter is on the march, produce situations where what would be utterly unfair and unreasonable in civilian life can only be regarded as proper and wholly reasonable in a military setting.

What, for instance, is such "manifest necessity" as will justify withdrawing a case from trial without danger of a successful plea of double jeopardy? As *Wade v. Hunter*, 336 U. S. 684, graphically illustrates, tactical considerations in an active campaign justify steps which under more static conditions could not be sustained. Cf. Art. 44(c), UCMJ. Another example is the effect, on double jeopardy, of the disapproval of court-martial proceedings (*United States v. Bayer*, 331 U. S. 532, 543), or of the automatic appellate review provided for in the UCMJ (*United States v. Zimmerman*, 2 USCMA 12, 6 CMR 12); here too the differences in the military situation may justifiably produce difference in result. So, with the rapid moves of personnel that military operations require, denial of the prosecution's right to use depositions in court-martial cases may well require a different attitude towards the guarantee of confrontation. *United States v. Sutton*, 3 USCMA 220, 11 CMR 220. Other instances come readily to mind: *United States v. Houghtaling*, 2 USCMA 230, 8 CMR 30 (effect of escape on jurisdiction to proceed with trial of a capital case); *United States v. Rhodes*, 3 USCMA 73, 11 CMR 73 (reasonableness of a search in a military setting); *United States v. Thompson*, 3 USCMA 620, 14 CMR 38 (carrying concealed weapon as a military offense, notwithstanding Second Amendment).

But distinctions that justify restraints and restrictions to "govern armies composed of strong men" are simply in-

applicable when those sought to be affected are civilians accompanying the forces in time of peace, and are *a fortiori* inapplicable when one is dealing with dependent wives. To urge that the considerations underlying the military law apply with equal logic and with equal vigor to a dependent wife who accompanies her serviceman husband overseas certainly verges upon, if indeed it does not enter the realm of, the fatuous.

D. Even as Administered Under the Uniform Code, Military Law is Still an Essentially Rough-Hewn System of Justice

In 1916, Congress adopted, at General Crowder's urging the first real revision of the Articles of War in over a century. But, although carefully drawn and representing the culmination of years of careful study, the revision failed in the test of World War I. The 1920 revision was adopted in consequence.

Tested in the crucible of the next war, the 1920 Articles of War proved likewise deficient, and there followed in rapid succession, first the 1948 amendments to the Articles of War, and then, in 1950, the Uniform Code of Military Justice, with its capstone of a civilian court of ultimate appeal.

The UCMJ and the 1951 MCM are carefully drawn to assure every serviceman his full measure of due process of law, with, indeed, many provisions, at the very least, even suggestive of undue process. But, unfortunately, some of the tendencies against which the UCMJ was directed are still very much in evidence.

In this connection, it is to be borne in mind that, under Art. 67(b), UCMJ, the bulk of the cases coming before the Court of Military Appeals cannot come there as of right, that less than nine per cent of the petitions for review have been granted, and that in the last two calendar years, the percentage of grants was between six and seven

per cent.⁷³ Thus only a very small percentage of the business coming to the Court of Military Appeals is determined on the merits.

None the less, even the limited number of decisions on the merits show that command influence, that bane of military justice, the pressure to convict, coming sometimes from the commander and quite as frequently from the commander's legal adviser, is still very much present in fact, and is moreover generally not scotched below the highest appellate level—if at all. See, for illustrative cases of this tendency in various manifestations at different levels, *United States v. Duffy*, 3 USCMA 20, 11 CMR 20; *United States v. Guest*, 3 USCMA 147, 11 CMR 147; *United States v. Lattrice*, 3 USCMA 487, 13 CMR 43; *United States v. Hunter*, 3 USCMA 497, 13 CMR 53; *United States v. Isbell*, 3 USCMA 782, 14 CMR 200; *United States v. Knudson*, 4 USCMA 587, 16 CMR 161; *United States v. Zagar*, 5 USCMA 410, 18 CMR 34.

The duties and obligations of the attorney-client relationship in a military society seem to have depended for their enforcement primarily on decisions of the Court of Military Appeals. See *United States v. Walker*, 3 USCMA 355, 12 CMR 111; *United States v. Green*, 5 USCMA 610, 18 CMR 234; *United States v. McCluskey*, 6 USCMA 545, 20 CMR 261. But where the Court of Military Appeals refuses to hold that military counsel has improperly represented con-

⁷³ The figures through 1954 are taken from *Annual Report of the United States Court of Military Appeals for the period January 1, 1954, to December 31, 1954*, p. 16.

From May 31, 1951, the effective date of the UCMJ, through December 31, 1954, the court received 24 mandatory cases under Art. 67(b)(1)—death sentences and general officers; 180 cases on certificates under Art. 67(b)(2); and 5934 petitions under Art. 67(b)(3).

Total petitions granted were 497; total denied were 5191. For 1954, 104 petitions were granted, as against 1703 denied.

For 1955, according to the Clerk's Office, 130 petitions were granted, as against 1687 denied.

flicting interests (*United States v. Stringer*, 4 USCMA 494, 16 CMR 68; Quinn, C. J., dissenting), then the standard falls below the one established by this Court (*Glasser v. United States*, 315 U. S. 60; see, e. g., *Craig v. United States*, 247 F. 2d 355 (C.A. 6)).

In many of the foregoing cases, no opinion was written by the intermediate appellate tribunal, the Board of Review, Art. 66, UCMJ. And one decision by the Court of Military Appeals lends sanction to a most disturbing practice by such a Board. *United States v. Thomas*, 3 USCMA 798, 14 CMR 216. There only two members heard the argument and submitted their opinion.⁷⁴ Reargument was then granted before a full Board, one new member having been added. The next day, the three-man board published its second opinion, in the precise language of the original opinion. *Held*, Quinn, C. J., dissenting, that this was proper.

Other cases are still more disturbing, not only because of what they reveal, but because they are later cases, dating from a period when the Uniform Code had been in operation for a sufficiently long time to have had its guiding principles permeate the consciousness of the services.

In *United States v. Deain*, 5 USCMA 44, 17 CMR 44, a Rear Admiral, the president of a permanent Navy general court-martial, was challenged by the defense. On *voir dire*, he said "that as a rule, that if a case is referred for trial, that there is a likelihood that some offense has been committed", and it was testified that he had at various times been heard to say "that anyone sent up here for trial must be guilty of something." It was also shown that this Rear Admiral made out the fitness reports on the other members of the court-martial. The challenge was not sustained, accused was convicted, and a Navy Board of Review affirmed. The Court of Military Appeals reversed.

⁷⁴ Two members of a Board of Review constitute a quorum. *United States v. Petroff-Tachomakoff*, 5 USCMA 824, 19 CMR 120.

In *United States v. Whitley*, 5 USCMA 786, 19 CMR 82, an accused was on trial before a Navy special court-martial. The president of the court made a number of rulings favorable to the defense. At a recess, he was relieved from detail as a member of the court, and another officer was substituted as president. The latter officer's rulings were more favorable to the prosecution, and accused was convicted. Held error but not prejudicial error by the Board of Review; reversed by the Court of Military Appeals.

In *United States v. Parker*, 6 USCMA 75, 19 CMR 201, accused was charged with several rapes, capital offenses. Art. 120, UCMJ. He was ordered to trial one day after the appointment of the court-martial and of one unassisted defense counsel, was found guilty, and was sentenced to death. An Army Board of Review affirmed. The Court of Military Appeals reversed, for inadequacy of representation.

In *United States v. Sears*, 6 USCMA 661, 20 CMR 377, charges against two airmen were referred to a special court-martial. One retained an English solicitor to defend him, after which three judge advocate officers were appointed as additional members of the court. Two were challenged peremptorily; under Art. 41(b), UCMJ, no further peremptory challenges were available. The third judge advocate then, during the trial, passed notes to the president of the court, advising him how to rule. A challenge of this third judge advocate for cause, then made, was not sustained; conviction followed, and an Air Force Board of Review affirmed. Reversed by the Court of Military Appeals because "the member 'joined the ranks of partisan advocates' and destroyed the accused's right to a fair trial."

In *United States v. McMahan*, 6 USCMA 709, 21 CMR 31, accused was charged with premeditated murder. His assigned defense counsel, a Major, made no opening state-

ment, refused to make any closing argument although there was little evidence of premeditation, and, after accused was found guilty as charged, said nothing about the sentence—as to which the court was limited to choosing between death and life imprisonment. Art. 118, UCMJ. An Army Board of Review affirmed the death sentence that the court-martial had imposed; the Court of Military Appeals reversed because of inadequacy of representation.

Truly, it takes more than an Act of Congress to inculcate a sense of justice. And any one examining the decisions listed under the present heading may well ask whether there can be any persuasive reasons for subjecting to this system of military law persons who are not strong men, persons who do not compose the fighting forces, persons who are simply unarmed women married to servicemen and living with them overseas.

E. The Record of Trial in the Present Case Bears Eloquent Witness Against the Extension of Military Jurisdiction Over Civilian Dependents

But it is not necessary to argue by example or to generalize. The very record of trial by court-martial in this case (Ex. M to Return and Answer)⁷⁵ shows with stark and compelling force just what happens when a dependent wife faces first a court-martial and then the agencies of military appellate review.

1. The only issue at the trial was whether appellee was sane when she killed her husband. Three Air Force doctors testified that she was, two to the contrary. After her conviction of premeditated murder in violation of Art. 118(1), UCMJ, and a consequent sentence to life imprisonment, two of the prosecution witnesses recanted their in-trial testimony in unsolicited affidavits (R. 142-145), and one

⁷⁵ Only a few pages of that record were printed. See R. 128-131. But the entire record, together with the post-trial affidavits (R. 136-145), was certified by the clerk of the court below and is now lodged with the Clerk of this Court.

of the defense expert witnesses, a clinical psychologist, amplified what he had earlier testified to (R. 136-142).

Captain Adelson, after setting forth in detail the results of his tests, diagnosed appellee's condition on the night she killed her husband as (R. 141) "psychosis, specifically, paranoid schizophrenia", and added (R. 141-142), "In either case [i.e., psychotic depression or paranoid schizophrenia], psychosis, meaning—I presume—legal irresponsibility, seems to me to have been clearly present. I disagree with a finding of neurotic depression, as that is counter-indicated by the bulk of the data I have gained from the patient's responses, and I am of the opinion that this data was not effectively or intensively examined by the members of the Sanity Board."⁷⁶

Captain Graves, a prosecution witness at the trial, deposed in his unsolicited post-trial affidavit (R. 142) that he was hampered in his testimony by the provisions of Air Force Manual 160-42 (see pp. 118-119, *infra*) and concluded (R. 143): "There is, I must state again, no psychiatric evidence of any sort which would lead me to believe that there was sufficient degree of conscious participation in the planning and execution of this act to refer to it as a premeditated crime. To consider it as such would in my opinion, from considerable knowledge of the past history and personality structure of this person, be a clear cut miscarriage of justice."

Lt. Col. Martin, another prosecution witness at the trial, stated that he was making his unsolicited post-trial affidavit (R. 143) because "the findings of the General Court-Martial are completely wrong." He, also, considered the provisions of Air Force Manual 160-42 to have hindered the expression of his medical views, explaining why in detail (R. 143-144). And he said (R. 144): "All of my feelings about this case can be summed up in the statement

⁷⁶ These members were the prosecution's three expert witnesses.

that I believe Mrs. Covert was what I would call 'temporarily insane' on the night of 10 March 1953. Since this is a legal and not a psychiatric term, I may have the wrong understanding. The term 'insanity', to me, means that the individual is not responsible for his or her behavior."

Yet, in the face of these three affidavits, the majority of the Air Force Board of Review in this case affirmed appellee's conviction of premeditated murder and the sentence of life imprisonment that was imposed (R. 61), saying (R. 42),

"We are unable to find in these post trial affidavits sufficient disagreement in the opinions of affiants, as against their testimony at trial, to substantially impeach their in-court testimony to the extent that any reasonable doubt as to the sanity of the accused has been established."

The foregoing has been set forth, not in any sense to retry the issue of appellee's sanity in the present proceedings, but simply to point out to the Court how the Air Force dealt with the evidence on that issue.

2. As the opinion of the Court of Military Appeals shows (R. 97-110), appellee's conviction was reversed because the prosecution's witnesses adhered too closely to the test set forth in Air Force Manual 160-42, *Psychiatry in Military Law*. This Manual is identical with the Army's Technical Manual 8-240, which was considered in the case of Mrs. Dorothy Krutger Smith (No. 713, at R. 52-91) and in the case of *Kunak*, 5 USCMA 346, 17 CMR 346. Basically, the question on which the Court of Military Appeals divided was whether this joint Army-Air Force Manual improperly circumscribed the testimonial freedom of the military expert witnesses, when it stated (p. 5, ¶ 5c, of the 1950 edition), "If the medical officer is satisfied that the accused would not have committed the act had there been a civil or military policeman at his elbow, he will not testify that the act occurred as the result of an 'irresistible impulse'." Chief Judge Quinn thought that the testimony in

all three cases showed that the "he will not testify" clause bound the military medical witnesses to the exclusion of their individual professional beliefs; see his concurrence in this case (R. 111), and his dissents in *Smith* (No. 713, R. 91-94) and *Kunak* (5 USCMA at 369-374, 17 CMR at 369-374).

It is neither necessary nor appropriate to resolve these differences here. But the course of all of these recent insanity cases indicates that, in the military system, there is at least grave danger that testimony as to who is and who is not sane will be directed. (p. ii of the Manuals concerned) "By order of the Secretaries of the Army and Air Force."

Is it desirable that the sanity of civilian dependents be thus determined?

3. In the District of Columbia, the traditional rules of legal responsibility have recently been recast in the light of scientific progress in psychiatry. *Durham v. United States*, 214 F.2d 862 (D. C. Cir.). In the *Smith* case, the Court of Military Appeals rejected the *Durham* rule, deeming itself bound by the contrary provisions of the 1951 *Manual for Courts-Martial* (No. 713, R. 52-91). Thus if the Air Force had proceeded with its plan to try appellee by court-martial at Bolling Field in the District of Columbia in November 1955. (R. 2, 8), her sanity would have been tested by a rule different from that applied in the United States Court House, a few miles away in the same District.^{76a}

4. Perhaps the most shocking manifestation of the impact of a system designed "to govern armies composed of strong men" on the case of a distraught and emotionally disturbed woman who was with child while on trial⁷⁷ is found in the sentence imposed.

^{76a} For a recent penetrating critique of the "right and wrong" rule, see Sobeloff, *Insanity and the Criminal Law: From McNaghten to Durham, and Beyond* (1955) 41 A. B. A. J. 793.

⁷⁷ R. 20, 95; unprinted court-martial transcript, pp. 124, 277. The child was born while she was a prisoner at Alderson (R. 2, 95).

The court-martial adjudged a sentence of life imprisonment (R. 2, 5-6). Although the record disclosed extreme emotional disturbance at least on the verge of insanity—the record of trial showed that, after the fatal act, appellee climbed into the cot with the corpse of her husband and stayed there all night (R. 23, 82)—the Board of Review approved her sentence in its entirety, saying (R. 61), “Anything less than life imprisonment, on the basis of the entire record before us, would be inappropriate and unwarranted.”

It is difficult to resist the view that such a judgment reflects vindictiveness, and that, indeed, it harks back to the ancient common law that deemed the killing of a husband by his wife not simply felony, but petty treason, and punished it, until late in the Eighteenth Century, by burning the offending woman at the stake.⁷⁸ At any rate, recent Air Force cases involving the killing of a civilian by airmen rather than, as here, the killing of an airman by a civilian, reflect a more merciful attitude towards the accused.

In his brief in the *Toth* case (U.S. Br., No. 3 this Term, p. 14, n. 3), the present Solicitor General pointed out that both of the individuals accused as accomplices of Toth had been tried and convicted—and that was the cold blooded murder of a Korean civilian committed by persons not shown to have been emotionally disturbed in any way.

Lieutenant Schreiber, who gave the order to kill, had his sentence to life imprisonment cut to five years by the convening authority. 16 CMR at 649. It was not further cut

⁷⁸ See 4 Bl. Comm. *203-204; 1 Stephen, *History of the Criminal Law of England* (1883) 477; 2 Holdsworth, *History of English Law* (3d ed. 1927) 449. Petty treason was not reduced to murder until 1828 (St. 9 Geo. IV, c. 31, § 2), and burning was only abolished as the punishment therefor in 1790 (St. 30 Geo. III, c. 48). For the grisly details of execution prior to the statute last cited, see Radzinowicz, *A History of English Criminal Law: The Movement for Reform 1750-1833* (1948) 209-213.

by the Board of Review (16 CMR 639, 674), but, after affirmance by the Court of Military Appeals (*United States v. Schreiber*, 5 USCMA 602, 18 CMR 226), so-appellee is advised, the prisoner was released after serving only twenty months.⁷⁹

Airman Kinder, who pulled the trigger, had his life sentence cut to two years by the convening authority, and the execution of his dishonorable discharge suspended (14 CMR 742, 752). Appellee is advised that Kinder was released after serving fifteen months and received an honorable discharge besides (note 79; *supra*).

Yet this appellee, disturbed, distraught, legally insane by the weight of the psychiatric testimony, was sentenced to imprisonment for life. And when, after more than two years' confinement, her conviction was set aside, the Air Force insisted on retrying her (R. 8, 122, 125), and at this moment all the legal resources of the United States are mobilized and marshaled to that end.

If this is not indeed an instance of a law "fair on its face and impartial in appearance" * * * applied and administered by public authority with an evil eye and an unequal hand" (*Yick Wo v. Hopkins*, 118 U. S. 356, 373-374), it emphasizes at any rate the utter inappropriateness of turning over to an armed force the dispensing of justice to an unarmed woman.

The court-martial jurisdiction, then, is preeminently a field for application of the principle, first enunciated by this Court 135 years ago, which calls for limitation to "the least possible power adequate to the end proposed." *Anderson v. Dunn*, 6 Wheat. 204, 231; *In re Michael*, 326 U. S. 224, 227; *Toth v. Quarles*, 350 U. S. 11, 23; *Cammer v. United States*, 350 U. S. 399, 404.

⁷⁹ And so alleged in par. 13 of the Petition, R. 3, on the basis of information obtained from Appellate Defense Counsel Division, Office of The Judge Advocate General, United States Air Force.

The experience of the armed forces since 1775, and the practice prior to 1941, join in demonstrating that the provisions of Art. 2(10), UCMJ, which subject to military jurisdiction only those civilians who, in time of war, are "serving with or accompanying an armed force in the field", are ample to meet all genuine needs of the armed forces. And both similarly join in supporting the basic proposition advanced by this appellee that the power "To make Rules for the Government and Regulation of the land and naval Forces" (Clause 14, Section 8, Article I) "does not confer power to make rules for the government and regulation of wives of members of the land and naval forces, and does not confer power upon Congress to subject civilians to trial by court-martial in time of peace" (R. 3, ¶ 12c).

CONCLUSION

For the reasons set forth in Point I, pp. 14-21, *supra*, this appeal should be dismissed for lack of jurisdiction.

If, however, the Court assumes jurisdiction, then, for the reasons set forth in Points II to V, pp. 21-122, *supra*, the judgment below should be affirmed.

Respectfully submitted.

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APRIL 1956.

APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

A. *Constitutional Provisions.*

1. Section 8 of Article I provides in pertinent part:

“The Congress shall have Power * * *

“To declare War * * *

“To make Rules for the Government and Regulation of the land and naval Forces;”

2. Section 2 of Article III provides in pertinent part:

“The Trial of all Crimes, except in Cases of Impeachment, shall be by Jury; and such Trial shall be held in the State where the said Crimes shall have been committed; but when not committed within any State, the Trial shall be at such Place or Places as the Congress may by Law have directed.”

3. The Sixth Amendment provides:

“In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.”

B. *Statutes.*

1. 28 U. S. C. § 1252, as amended, provides in pertinent part:

“§ 1252. Direct appeals from decisions invalidating Acts of Congress

“Any party may appeal to the Supreme Court from an interlocutory or final judgment, decree or order of any court of the United States, * * * holding an Act of Congress unconstitutional in any civil action, suit,

or proceeding to which the United States or any of its agencies, or any officer or employee thereof, as such officer or employee, is a party.

"A party who has received notice of appeal under this section shall take any subsequent appeal or cross appeal to the Supreme Court. All appeals or cross appeals taken to other courts prior to such notice shall be treated as taken directly to the Supreme Court."

2. Article of War 2(d) of 1916, 1920, and 1948 (10 U. S. C. [1926 through 1946 eds.] § 1473) was as follows:

"ART. 2. PERSONS SUBJECT TO MILITARY LAW.—The following persons are subject to these articles and shall be understood as included in the term 'any person subject to military law,' or 'persons subject to military law,' whenever used in these articles: . . .

"(d) All retainers to the camp and all persons accompanying or serving with the armies of the United States without the territorial jurisdiction of the United States, and in time of war all such retainers and persons accompanying or serving with the armies of the United States in the field, both within and without the territorial jurisdiction of the United States, though not otherwise subject to these articles;"

3. Article of War 12 of 1948 (10 U. S. C. [Supp. II to 1946 ed.] § 1483) was as follows:

ART. 12. GENERAL COURTS-MARTIAL.—General courts-martial shall have power to try any person subject to military law for any crime or offense made punishable by these articles, and any other person who by the law of war is subject to trial by military tribunals: *Provided*, That general courts-martial shall have power to adjudge any punishment authorized by law or the custom of the service including a bad-conduct discharge."

4. Article 2 of the Uniform Code of Military Justice (50 U. S. C. § 552) provides in pertinent part as follows:

"ART. 2. Persons subject to the code.

"The following persons are subject to this code:

"(7) All persons in custody of the armed forces serving a sentence imposed by a court-martial;

"(10) In time of war, all persons serving with or accompanying an armed force in the field;

"(11) Subject to the provisions of any treaty or agreement to which the United States is or may be a party or to any accepted rule of international law, all persons serving with, employed by, or accompanying the armed forces without the continental limits of the United States and without the following territories: That part of Alaska east of longitude one hundred and seventy-two degrees west, the Canal Zone, the main group of the Hawaiian Islands, Puerto Rico, and the Virgin Islands;"

5. Article 18 of the Uniform Code of Military Justice (50 U. S. C. § 578) provides:

"ART. 18. Jurisdiction of general courts-martial.

"Subject to article 17, general courts-martial shall have jurisdiction to try persons subject to this code for any offense made punishable by this code and may, under such limitations as the President may prescribe, adjudge any punishment not forbidden by this code, including the penalty of death when specifically authorized by this code. General courts-martial shall also have jurisdiction to try any person who by the law of war is subject to trial by a military tribunal and may adjudge any punishment permitted by the law of war."

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1955

No. 701

CURTIS REID, Superintendent of the District
of Columbia Jail, *Appellant*,

v.

CLARICE B. COVERT

On Appeal from the United States District Court for the
District of Columbia

No. 713

NINA KINSELLA, Warden of the Federal Reformatory
for Women, Alderson, West Virginia, *Petitioner*,

v.

WALTER KRUEGER

On Writ of Certiorari to the United States Court of
Appeals for the Fourth Circuit

PETITION FOR REHEARING

Now come CLARICE B. COVERT, Appellee in No. 701,
and WALTER KRUEGER, Respondent in No. 713, and
respectfully pray the Court to grant rehearings in these
causes.

Mrs. Covert and Mrs. Smith, the two civilian women whose fate is here in issue, were tried by *court-martial*, pursuant to Article 2(11) of the Uniform Code of *Military Justice*, and had their convictions successively reviewed by Boards of Review in the Offices of the *Judge Advocate General of the Air Force* and of the *Army*, respectively, and then by the Court of *Military Appeals*. The latter tribunal held, while the present cases were under advisement here, that "Article 2(11) of the Code is a valid exercise of Congressional power granted by the Constitution 'to make Rules for the Government and Regulation of the land and naval Forces.'" *United States v. St. Clair*, 7 USCMA 82, 83, 21 CMR 208, 209, decided May 25, 1956. But this Court declares (slip opinion, No. 713, pp. 6-7) that, there is no need to examine the power of Congress under that clause of the Constitution.

The concept of presenting Hamlet without the Prince of Denmark doubtless has fascination. But just as the Melancholy Dane cannot, despite heroic efforts, be completely exorcised from the play, just as he constantly flits back and forth into the action regardless of nomenclature, so in these cases, where the results were reached after ostensible rejection of whatever powers the Constitution has conferred upon Congress to govern the armed forces, a reading of the Court's opinions makes obvious that military considerations were necessarily relied upon to uphold the court-martial proceedings here under review.

A. Thus it is said (slip opinion, No. 713, pp. 7-8) that the United States must maintain American forces in many foreign countries: that "the lives of military

and civilian personnel alike are geared to the local military organization"; and that by enacting Article 2(11) "Congress has provided that all shall be subject to the same system of justice and that *the military commander who bears full responsibility for the care and safety of those civilians attached to his command shall also have authority to regulate their conduct.*" [Italics added.] These, without question, are purely military considerations relevant to—and relevant only to—the power "To make Rules for the Government and Regulation of the Land and naval Forces."

B. It is said (slip opinion, No. 713, pp. 10-11) that "this case presents no problem of * * * the power of Congress to provide for trial of Americans sojourning, touring, or temporarily residing abroad." But *In re Ross*, 140 U.S. 453, on which the jurisdiction in the present cases is rested, involved the trial by an American consular court of a British subject who was temporarily in Japan only while the American ship in whose crew he served was lying at anchor in Yokohama harbor. See 140 U.S. at 456-457, 470-475. The difference between Ross's situation and that of the two women involved here is that they were abroad for a far less temporary stay, the exact length of which was dependent on their respective husbands' tours of military duty, and that their American links were far less tenuous than those of Ross. Again, the governing consideration is their relationship to the American armed force of which their husbands were members.

C. In No. 701, the Court's opinion (pp. 4-5) speaks of "military jurisdiction", of "military prisoners", and cites decisions of "military courts" in considering whether Mrs. Covert may be retried by a court-martial within the District of Columbia.

Thus, the Court sustains, in these two cases, an obvious exercise of the power "To make Rules for the Government and Regulation of the land and naval Forces" while disclaiming all inquiry into the extent of that power. And for the first time in the Court's history, it approves the trial of civilian women by court-martial in time of peace.

II

The Court says (slip opinion, No. 713, p. 8) that "The choice among different types of legislative tribunals is peculiarly within the power of Congress," citing *Ex parte Bakelite Corp.*, 279 U.S. 438, 451. But to deal with these cases in terms of legislative choice is to rest on a demonstrable fiction, for it is the incontrovertible fact that Congress never considered that it was being faced with any "choice among different types of legislative tribunals."

The legislative materials reflect no awareness whatever of any constitutional problem. They show without question that, in 1916 when it first extended court-martial jurisdiction over civilians accompanying the armies in time of peace in AW 2(d), in 1920 when it reenacted that provision, in 1948 when it permitted AW 2(d) to survive the amendments to the other Articles of War passed in that year, and again in 1949-1950, when it extended the same provision to all of the armed forces as Article 2(11), UCMJ, Congress never considered the constitutionality of that jurisdiction under any clause of the Constitution,¹ much

¹ The Code is a uniform system of legal procedure, applicable beyond any constitutional question to all servicemen stationed abroad. It was adopted by Congress only after an exhaustive study of several years duration and the consultation of acknowledged

less that it made a deliberate selection among classes of available tribunals. The same legislative materials also show that, in 1916, in 1920, in 1948, and again in 1949 and 1950, there was simply no mention of courts other than courts-martial for the trial of accompanying civilians; that at no time in the hearings or on the floor of either house was there even a whisper about consular courts; and that *In re Ross*, 140 U.S. 453, was not cited by anyone, anywhere, at any time. These omissions, it is proper to add, should hardly occasion surprise, inasmuch as the traditional view regarded a court-martial, not as a species of legislative court, but as "a purely executive agency designed for military uses." Winthrop, *Military Law and Precedents* (2d ed. 1896) *54 [1920 reprint, p. 49].

The Court's reference to Congressional choice in connection with Article 2(11) is the more unreal when it is borne in mind that the Uniform Code of Military Justice in the House was under the unchallenged control of that body's Committee on Armed Services; that extensive hearings were had thereon by the Senate Committee on Armed Services; that a proposal thereafter to take the Code from the calendar for reference to the Senate Committee on the Judiciary was opposed by the Chairman of the Armed Forces Committee on the ground that the Code was essentially a reincorporation of existing law and that it was "an extremely important step toward unification [of the armed services] and provides for reforms in the court-martial

authorities in the fields of constitutional and military law." Slip opinion, No. 713, pp. 8-9, citing the 1949 Hearings before a Subcommittee of the House Committee on Armed Services.

No reference to any specific discussion of the constitutionality of Article 2(11) is made in the Court's opinion—and none; it is submitted, can be made: There was no such discussion.

system which should be enacted as soon as possible" (96 Cong. Rec. 1366-1368); and that the motion for change of reference was defeated (96 Cong. Rec. 1412-1417).

To the extent, therefore, that there was any expression of preference, the choice was to consider the Code under the aegis of the Committee most conversant with military problems, which dealt with the matter on the footing of continuing a military policy already on the statute book, and which in consequence would hardly be expected to weigh competing considerations.

In short, insofar as one can properly attribute to Congress any intent with respect to a problem of which it was not really aware, that intent was to proceed under its power to govern the armed forces and not under such powers as it may have had to create a particular type of legislative court from among those available. The latter choice it did not choose to make.

III¹

Nowhere in the Court's opinions is there any mention of the specific source of constitutional power on which the present extraordinary court-martial jurisdiction over civilians is rested.

Inquiry into the scope of the power to govern and regulate the armed forces is expressly avoided (slip opinion, No. 713, pp. 6-7). The war power—Article I, Section 8, Clause 11—is not mentioned. The now exploded notion that the "cases arising in the land or naval forces" clause of the Fifth Amendment is in itself a source of military jurisdiction (*Toth v. Quarles*, 350 U.S. 11, 14) is not sought to be revived. The treaty power is not relied on; the Court says

(*id.*, p. 11) that "No question of the legal relation between treaties and the Constitution is presented." And while there is a reference (*id.*, p. 5) to legislative courts and the line of cases beginning with *American Ins. Co. v. Canter*, 1 Pet: 511, the power considered in those cases was that granted by Article IV, Section 3, to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States," a power that is obviously irrelevant when the United States is on foreign soil with the consent of the foreign sovereign—the situation in both cases here.

The Court does not point to any clause or phrase of the Constitution that confers on the Congress power to withdraw from American citizens seeking protection against the acts of American officials not only the guarantee of trial by jury (Article III, Section 2; Sixth Amendment) and of indictment by grand jury (Fifth Amendment), but also the Sixth Amendment's guarantee of confrontation (*United States v. Sutton*, 3 USCA 220, 11 CMR 220) and the Eighth Amendment's guarantee of the right to bail (Dig. Op. JAG, 1912, p. 481, 11C)—and this under a system of procedure formulated by the President pursuant to authority delegated to him in his capacity as Commander-in-Chief. Article 36, UCMJ (50 U.S.C. §611); *Manual for Courts-Martial, US, 1951* (Ex. Order 10214, 16 Fed. Reg. 1303). It is one matter to draw on the President's inherent power as Commander-in-Chief to discipline the armed forces (*Swain v. United States*, 165 U.S. 553, 555-558); it is quite another to rest on that source when dealing with the rights of American civilians. Yet it is the *Manual* prescribed by the President by which the criminal liability of both women has been or will be determined, as the military opinions in their

cases clearly show (No. 701, R. 12-121; No. 713, R. 23-94). Otherwise stated, the test of whether their respective mental states negatived legal responsibility—the sole contested issue before the military authorities in both cases—has been laid down by the President—and only by the President.

What is there in the Constitution that endows the Chief Executive with such untrammelled power over the liberty of two civilians?

To say that the Court's opinions raise more constitutional questions than they resolve is therefore not in any sense hyperbole.

IV

In No. 713, the Court could say (slip opinion, p. 10), "We note that this case presents no problem of the jurisdiction of a military court-martial sitting within the territorial limits of the United States * * *". But that precise problem is squarely presented in No. 701, the case of Mrs. Covert, who was being held for retrial by a general court-martial of the Air Force at Bolling Air Force Base within the District of Columbia.

In her case, the Court holds that a jurisdiction carefully circumscribed to persons accompanying the armed forces "without the continental limits of the United States" (Art. 2(11), UCMJ) is nonetheless applicable to Mrs. Covert within those limits, because (slip opinion, No. 701, p. 5) "military jurisdiction, once validly attached, continues until final disposition of the case." Mrs. Covert has never questioned, at any stage of the present case, the proposition that a rehearing is a continuation of the original proceeding.

But the quoted holding makes the Court more militarist than the military, without a single military precedent to support its conclusion; for the military rulings, from the Civil War down through the Korean conflict, are uniformly to the effect that any separation of the individual from military status by affirmative act of Government, at any stage of the proceedings, terminates military jurisdiction over him.² Since discharge, muster out, or release to inactive duty has that effect on a soldier, because it changes him from soldier back to civilian, then surely the Government's act of removing a serviceman's dependent wife from without back to within the continental limits of the United States should similarly terminate an amenability to trial by court-martial that is geographically restricted by the Code to civilians overseas.

Mrs. Covert's military status under the Code was dependent on her accompanying the armed forces overseas. When the Government brought her back to the United States, it terminated that military status. And certainly her trial by court-martial within the United States is not even sought to be constitutionally justified by any of the considerations set forth in the Court's opinion in No. 713. Nowhere there is it suggested that Ross could have been tried in this country by the consul before whom he was haled in Japan.

If, however, the Court's ruling on this point stands, then some time this fall or winter—because the Air Force is determined to retry Mrs. Covert, almost as

² Dig. Op. JAG, 1912, p. 514, ¶ VIII F1 (rulings from 1862 on); *United States v. Sippel*, 4 USCMA 50, 53, 15 CMR 50, 53 (1954); and see the rulings collected and discussed in appellee's brief at pp. 23-27.

though its military honor were somehow involved³—there will be presented the spectacle, frightening in its forebodings for the future, of a civilian woman on trial before a military tribunal in the District of Columbia. This will be the first such trial since that of Mrs. Surratt—which is hardly a pretty precedent, or one of which any American can be proud. See, e.g., Moore, *The Case of Mrs. Surratt* (1954).

V

But there is an issue now presented by these cases that far transcends the future of the two women immediately involved, and which is infinitely more disturbing in its implications than any of the serious constitutional questions already canvassed.

That issue concerns the Court's adjudicatory procedures in these cases.

Both cases were placed on the summary calendar (J. Sup. Ct., Oct. T. 1955, p. 173), and, as the references in the margin show, both were prepared for argument on an accelerated schedule that cut nearly in half the time for briefs allowed under the new Rules.⁴

³ The Solicitor General opposed her motion to stay the mandate pending the Court's disposition of the present Petition for Rehearing unless she would consent to subject herself to further psychiatric probing at St. Elizabeth's during the summer. Otherwise stated, the Government offered her a choice between confinement in jail and confinement in an asylum. On June 18, 1956, however, Mr. Justice Clark granted her motion and stayed the mandate.

⁴ There was no printed record below in either case. The Clerk's files show that he transmitted the printed records to counsel for the parties on March 21 and 22. Under Rules 41(1), 41(2), and 43(1), argument should therefore normally have been held some 75 days later. In fact, it took place on May 3, an interval of only 42 days.

The argument itself came late in the Term. Indeed, not only was that argument the last on the calendar, on May 3 (J. Sup. Ct., Oct. T., 1955, pp. 230-231)—but it took place very late on that day, concluding long after the usual adjournment hour.⁵ The question whether military jurisdiction over Mrs. Covert continued so as to subject her to retrial by court-martial in the United States was not discussed orally by either side, and on the basic issue that is considered by the Court in Mrs. Smith's case, losing counsel was asked only three questions, one of which inquired as to the location of a treaty provision that had been mentioned orally.⁶ To the extent, therefore, that there is "a tradition of the Supreme Court as a tribunal not designed as a dozing audience for the reading of soliloquies, but as a questioning body, utilizing oral arguments as a means for exposing the difficulties of a case with a view to meeting them", the lateness of the hour perceptibly impaired the probing process.

Most serious of all, however, is the circumstance that the Court's opinions were announced before the three dissenting Justices had had time to formulate their views, and before another Justice had even been able to reach a decision. It cannot be said that a further period of waiting would have been without effect. Only recently, a Justice whose experience spanned twelve full Terms declared, in his posthumous declaration of constitutional faith, that "not infrequently the detailed study required to write an opinion, or the persuasiveness of an opinion or dissent, will lead to a

⁵ The argument ended at 5:40 P.M. (Ward & Paul Transcript, p. 64), whereas the traditional time for adjournment, now codified in Rule 4(1), is of course 4:30 P.M.

⁶ Ward & Paul Transcript, pp. 52, 54.

change of a vote or even to a change of result." Jackson, *The Supreme Court in the American System of Government*, p. 15.

These petitioners for rehearing, therefore, may justly complain that their contentions did not receive as full consideration as if their causes had been argued a few months earlier. And they cannot forbear to remark that there appears to be no compelling reason of judicial administration why all of the Term's cases must be disposed of within the Term, or why the Court cannot return to its former practice of holding argued cases over the summer for disposition at the following Term.⁷ Otherwise there is added to the inherent hazards of litigation the further danger of an inequality of treatment as among litigants that rests only on the happenstance of the position of the case on the calendar for the particular Term.

But, if the present practice is to be continued, then, assuredly, reargument is called for in these cases. True, "Rehearings are not a healthy step in the judicial process; surely they ought not to be deemed normal procedure." *Western Pacific Railroad Case*, 345 U.S. 247, 270. But certainly the issues that are involved in the present causes would seem to have far more public importance than those that were under consideration in the last two instances wherein this

⁷ As late as the 1929 Term, the Court decided eight cases that had been argued during the 1928 Term. *Gonzales v. Roman Catholic Archbishop*, 280 U.S. 1; *FTC v. Klesner*, 280 U.S. 19; *Sanitary Refrig. Co. v. Winters*, 280 U.S. 30; *Williams v. Riley*, 280 U.S. 78; *Beckins Van Lines v. Riley*, 280 U.S. 80; *Grant v. Leach & Co.*, 280 U.S. 351; *Surplus Trading Co. v. Cook*, 281 U.S. 647; *Wheeler Lumber Co. v. United States*, 281 U.S. 572 (argued April 25, 1929; certificate dismissed May 27, 1929; restored to docket for reconsideration June 3, 1929; decided May 26, 1930).

Court granted a rehearing after opinions had already been published. *Elgin, J. & E. R. Co. v. Barley*, 325 U.S. 711, rehearing granted, 326 U.S. 801, second opinions, 327 U.S. 661; *Gracer Mfg. Co. v. Linde Co.*, 336 U.S. 271, rehearing granted, 337 U.S. 910, second opinions, 339 U.S. 605.

Least of all in the present cases, which will have such far-reaching consequences for so many individuals, and which plainly concern grave national policies as well, can the Court afford to substitute for the patient maturing of the judicial process a method of disposing of causes that all too obviously involves decision by deadline.

VI

This Petition for Rehearing should be granted, and both cases should be set down for reargument on the regular calendar.

Respectfully submitted,

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*Counsel for the Appellee in No. 701 and
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CERTIFICATE OF COUNSEL

I certify that this petition is presented in good faith and not for delay.

FREDERICK BERNAYS WIENER

JULY 1956.